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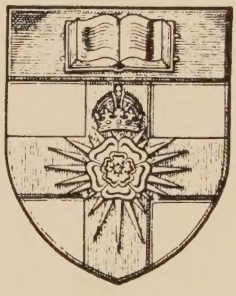

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CASES

DETERMINED BY THE

COURT OF COMMON PLEAS

AND BY THE

COURT OF EXCHEQUER CHAMBER,

ON ERROR AND APPEAL FROM THE COURT OF COMMON PLEAS,

IN AND AFTER

MICHAELMAS TERM, XXXIII VICTORIA.

MYERS *v.* THE LONDON AND SOUTH WESTERN RAILWAY COMPANY.

1869
Nov. 15.

Carriers—Mileage Rate—Interpretation of Statute—9 & 10 *Vict. c. cxxxi., s.* 13.

A railway company received goods for carriage from S. to L. In the course of the journey they carried the goods from a point C. on the line to N., and back again to C., and thence on to L., but this was their usual and a reasonable way of carrying goods, there being a large goods station at N.

By the Act of incorporation of the company it was provided that they should not charge for the carriage of goods of the kind in question more than 3*d.* per ton per mile:—

Held, that the company were entitled to charge 3*d.* per ton per mile in respect of the distance from C. to N. and back, in addition to the distance in the direct line from S. to L.

APPEAL from the County Court of Hampshire, held at Southampton.

The action was to recover back an overcharge alleged to have been made by the defendants, and paid by the plaintiff under protest, for the carriage of machinery.

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The defendants were a railway company carrying on the business of common carriers. The goods in question were collected from the plaintiff's premises at Southampton by the defendants to be carried by them as common carriers, and to be delivered according to the direction, which was "Luton to order, viâ Great Northern." The goods were conveyed in the same truck, without unloading, on the defendants' railway from Southampton, through Clapham Junction, on to Nine Elms, where the defendants have a large goods station, from thence back to Clapham Junction, from Clapham Junction to Blackfriars on the London, Chatham, and Dover Railway, from Blackfriars to King's Cross on the Metropolitan and Great Northern Railways, and from King's Cross to Luton by the Great Northern Railway.

The plaintiff contended that the defendants were, under the statutes affecting and regulating the railways over which the plaintiff's goods were conveyed, bound to charge no more for these goods than 3*d.* per ton per mile over the whole journey, taking the most direct route, with the exception of 2*s.* 6*d.* per ton at each end for loading and unloading, and therefore were not entitled to charge for the distance between Clapham Junction and Nine Elms and back.

It was contended by the defendants that they were not so bound.

The judge of the county court held (so far as is material for the present case) that the amount charged by the defendants was a reasonable amount, and the route adopted a reasonable one under all the circumstances of the case, but held that the defendants were bound by the statutes referred to only to charge 3*d.* per ton per mile over the whole journey by the nearest route, as contended for by the plaintiff; and the defendants having charged for the distance between Clapham Junction and Nine Elms and back, he gave judgment in favour of the plaintiff, and granted this case.

The question for the opinion of the Court was, whether, in a case like the present, in which the defendants undertook to have the goods conveyed from Southampton to Luton, the plaintiff was entitled to recover back the amount claimed from the defendants as an excessive charge; if the plaintiff was so entitled, the judg-

ment for the plaintiff was to stand; if not so entitled, judgment was to be entered for the defendants.

Denman, Q.C. (*Mangles* with him), appeared for the defendants, but THE COURT called on

Bere, Q.C., for the plaintiff. The company are bound by their Act (9 & 10 Vict. c. cxxxi. s. 13) (1) not to charge more than 3*d.* a ton per mile for the carriage of goods such as those now in question, and this must mean 3*d.* per mile for the direct distance by their line between the two places. They may be entitled to carry the goods by a longer route, if more convenient to themselves, but they are not entitled to charge the owner of the goods any more on that account. If a passenger by a parliamentary train were carried past the station to which he was going, and then sent back, he could not be charged for more than the direct distance to the station to which he was going.

BOVILL, C.J. I understand the question that has been submitted by the county court judge for the opinion of the Court is, whether the company were bound to charge only for the number of miles that the goods would have been carried if they had been conveyed by the shortest route, and I confine myself to that question. I am of opinion that they are not bound to do so. It must be taken that the route by which the goods were carried was the usual one, and the judge has found that it was also reasonable. I think, therefore, they are entitled to charge for the whole number of miles the goods were carried.

WILLES, J. I am of the same opinion. A carrier is not bound to carry goods by the shortest route, but only by the route by

(1) 9 & 10 Vict. c. cxxxi. s. 13:— "Notwithstanding anything in the said recited Acts or this Act contained, the maximum charges to be made by the company in respect of all the tolls and charges for the use of the said London and South Western Railway, and the railways from time to time purchased, hired, or otherwise acquired and held by the said London and South Western Railway Company, and of any carriage, and for locomotive power and every other expense incidental to such conveyance, except loading and unloading, where such service is performed by the company, shall not exceed the sums following, that is to say (inter alia): for all cotton, and articles in the said Act classed therewith, threepence per ton per mile."

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which he usually carries them, and which he professes to go. In the old coach days, two coaches often travelled between the same two towns by different routes, one longer than the other, and I apprehend that if the Act now under discussion had applied to such coaches, they would each have been entitled to charge for the distance they actually went. So the South Eastern Railway Company, who have made a new and shorter line through Sevenoaks, might keep that for passenger traffic, and use their old line for the carriage of goods, and might charge for the longer distance, which they would thus actually carry them. I think, therefore, the judgment ought to be reversed.

KEATING and BRETT, JJ., concurred.

Judgment for the defendants.

Attorney for plaintiff: *J. Vincent.*
Attorney for defendants: *L. Crombie.*

Nov. 15.

HOOPER *v.* MARSHALL.

Composition Deed—Bankruptcy Act, 1861 (24 & 25 *Vict.* c. 134)—*Bill of Exchange—Sureties—Pleading—Departure.*

Declaration by the drawer of a bill of exchange against the acceptor, not stating that it was payable to order.

Plea of a composition deed containing the usual reservation of the rights of creditors against sureties.

Replication, that the bill was payable to order, and at the time of the making of the composition deed was outstanding in the hands of third parties to whom the plaintiff had since paid the amount of it; and that the plaintiff had not assented to or signed the deed. On demurrer to the replication:—

Held, first, that it was no departure from the declaration, but, secondly, that the claims of sureties against the principal debtor were not preserved by the deed, and the plaintiff was bound by it under the circumstances mentioned in the replication, which was therefore bad.

DECLARATION, on the common counts, and for that the plaintiff, on the 7th of February, 1868, by his bill of exchange now overdue, directed to the defendant, required the defendant to pay to the

plaintiff 24*l.* 4*s.* 3*d.* two months after date, and the defendant accepted the bill and did not pay the same.

Pleas: 1. Except as to 5*l.* 10*s.*, a composition deed made by the defendant, containing a release by the creditors of their debts, with the following proviso: Provided always, and it is hereby agreed and declared, that nothing herein contained shall in anywise prejudice or affect any lien or other security held by any creditor who would not have been prejudiced or affected by proceedings in bankruptcy if the said defendant had been adjudicated a bankrupt, and that no creditor shall, by or in consequence of these presents, be prejudiced or affected as to his right or remedy against any person or persons other than the said defendant, whose name shall appear on any bond, bill of exchange, guarantee, or other document held by such creditor.

2. As to the 5*l.* 10*s.*, payment into court.

Replication, to the defendant's first plea, so far as it related to the bill of exchange in the second count mentioned, that the bill was payable to the plaintiff or order, and that before the making of the deed the plaintiff endorsed the bill for value to Herring, Dewick, & Hardy, who at the time of the making and registration of the deed were the holders of it in their own right and for value, and that the bill was duly presented for payment while Herring, Dewick, & Hardy were holders, and was dishonoured, of which the plaintiff had due notice: that the plaintiff never assented to or executed the deed, and that after its registration and before suit the plaintiff was compelled to pay and did pay to Herring, Dewick, & Hardy the amount of the bill in discharge of his liability as drawer; whereupon the bill was returned to the plaintiff and he continued to be the holder of it at the commencement of the action: that, except as in the replication mentioned, the plaintiff was not a creditor of the defendant in respect of his claim on the bill.

Demurrer to the replication and joinder.

Barnard, in support of the demurrer. First, the replication is a departure from the declaration, which does not allege that the bill was payable to order, and is therefore inconsistent with the replication, which treats it as a negotiable instrument. Secondly,

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the plaintiff was a creditor of the defendant in respect of the bill at the time the deed was made, notwithstanding the bill was then outstanding. This appears clearly from *Wood* v. *De Mattos*. (1) The case of *Ex parte Petrie* (2), which is supposed to shew the contrary, refers only to the mode of reckoning assents to a composition deed under the Bankruptcy Acts, and has no relation to the question, who are to be bound by the deed?

Raymond, in support of the replication. First, this deed does not release the plaintiff's debt, even if the plaintiff be bound by the deed, for the deed contains an express reservation of the rights of the creditors against sureties, and this implies at common law an exception of the rights of the sureties against the principal debtor: this is clear from *Solly* v. *Forbes*. (3) Does then the Bankruptcy Act, 1861, make any difference as to the interpretation of the deed? There seems no reason why it should do so, and if not, the deed does not release the plaintiff's claim against the defendant in respect of the debt which he has paid as his surety. The case of bankruptcy is different: the rights of parties in that case being decided by express enactment; but in the case of composition deeds the rights of the parties are founded upon the contract, and it is unreasonable that the debtor and creditors should be allowed at their will to alter the liability of the sureties without their consent.

Secondly. The plaintiff was not a creditor of the defendant at the time the deed was made. There was no reason to suppose even that he would ever become such, and the case of *Ex parte Petrie* (2) is strong to shew that a person in the position in which the plaintiff then was is not to be treated as a creditor within the meaning of the Bankruptcy Acts.

BOVILL, C.J. The first point argued by Mr. Barnard was, that the replication was a departure from the declaration; but I think there is no pretence for saying so. The plaintiff claimed originally as holder of the bill, and the replication states how he became so; the question, therefore, turns on whether the plaintiff's rights are excepted from those released by the composition deed. I

(1) Law Rep. 1 Ex. 91. (2) Law Rep. 3 Ch. App. 232.
(3) 2 B. & B. 38.

think that they are not: it is true that, as a rule, the release of a principal is a release of the surety, and that if the principal agrees, as he may do, that the right of the creditor against the surety shall continue, the surety is entitled to recover against him anything that he is compelled to pay. This deed, however, if binding on the plaintiff at all, is so by statute, and the question is therefore, what is the effect of the Bankruptcy Acts? Under the general law of bankruptcy there is no doubt that the subsequent parties to a bill would remain bound, notwithstanding the discharge of the acceptor, and composition deeds are intended to have very much the same effect as bankruptcy; and the special provision in this deed, reserving the rights of creditors against sureties, seems designed to put all parties in the same position as they would have been under a bankruptcy. There is, no doubt, much difficulty in placing a construction on the exact terms of the Bankruptcy Acts; and in the case of *Ex parte Petrie* (1), it was, certainly, held that persons in the position of the plaintiff ought not to be taken into account in reckoning the amount of the assents to a composition deed; that decision turned mainly on the words of the 200th section of the Bankruptcy Act, 1861, and seems to leave untouched the question whether the plaintiff is bound by such a deed under the 192nd section, which, however, received a construction in *Wood* v. *De Mattos* (2), where it was held that such persons were to be considered as creditors within that section, and their claims barred by deeds made under it.

WILLES, J. I am of the same opinion. The plaintiff sues on the bill; that is, on a contract which was entered into before the composition deed was made; and one of the immediate consequences of that contract was, that the defendant was primarily liable for the amount of the bill, and the plaintiff liable on his default as on a contract of indemnity. That being so, the bill got into the hands of third parties, who had then the sole control of it. If the defendant had then paid the holder the plaintiff would have been discharged, and if the latter had afterwards paid it he could not have obtained repayment from the defendant; so, if the holder had released the defendant, he would, independently of the Bank-

(1) Law Rep. 3 Ch. App. 232. (2) Law Rep. 1 Ex. 91.

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ruptcy Acts, have discharged the plaintiff also; if, however, the document, though in form a release, had reserved his rights against the plaintiff, which it might have done, it would have operated as a covenant not to sue the defendant; and, if the plaintiff had then paid the holder, he would have been entitled to have recourse to the defendant for repayment. The defendant, therefore, must rely on the statute to support his demurrer, since, unless the plaintiff is barred by the deed, he is entitled to recover; that raises the question whether the Bankruptcy Act, 1861, includes in the term "creditors" persons who, in respect of some contract actually entered into before the making of the deed, may become creditors at a subsequent period upon certain contingencies. If so, the deed is binding upon the plaintiff, for he was in that condition when it was made, and it then operates as a release of his claim against the defendant when it has arisen. Now, in *Wood* v. *De Mattos* (1) it was expressly decided in the Exchequer Chamber that contingent claims proveable in bankruptcy constituted the claimants creditors within the meaning of the sections of the Bankruptcy Act, 1861, relating to composition deeds. There can be no doubt that the decision applied not only to contingent debts, but to debts provided for by s. 173 of the Act, and which can hardly be called contingent. This appears clearly from looking at the 14th clause of the deed that was in question in that case. We should, therefore, in effect overrule that decision if we did not hold it applicable to this case. The deed, therefore, is binding upon the plaintiff, and he cannot enforce his claim.

KEATING, J. I am of the same opinion. At the time the deed was made the plaintiff was a person contingently liable on the bill, and he was therefore, according to the decision of *Wood* v. *De Mattos* (1), bound by the deed. Mr. Raymond has contended that the effect of the statute is got rid of by the express words of the deed; but I do not think that the clause he has relied on does, in fact, at all affect the question.

BRETT, J. I understood Mr. Raymond to say that the deed, though it does not expressly reserve the rights of the sureties against

(1) Law Rep. 1 Ex. 91. 12 Jun 1870

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the principal debtor, does so impliedly, by reserving the rights of the creditors against the sureties. This reasoning might be sound but for the effect of the statute; but *Wood* v. *De Mattos* (1) has decided that he was a creditor at the time of the making of the deed, and therefore he has by express terms released his claim against the defendant.

Judgment for the defendant.

Attorney for plaintiff: *J. Craven.*
Attorneys for defendant: *Phillips & Willicombe.*

HORSEY *v.* GRAHAM.

Nov. 19.

Statute of Frauds—Contract or Sale of an Interest in Land—Written Memorandum.

The plaintiff, being desirous of obtaining a transfer of the lease of a public-house from the defendant, who was a public-house broker, signed an agreement in the following terms: —"Mr. H. (the plaintiff) now informs me he is in possession of 60*l.* cash, and such being the case, I hereby agree to get the lease and everything, for such sum of 60*l.* cash." The defendant had no interest in the public-house himself:—

Held, first (Keating, J., dubitante), that the contract required to be in writing under the 4th section of the Statute of Frauds.

Secondly, that the agreement was sufficiently definite to constitute a good memorandum in writing, and that the meaning of the word "everything" might be explained by a previous memorandum in writing; also that parol evidence was admissible to shew what the lease was to which the agreement referred.

DECLARATION, alleging an agreement by the defendant to procure a sale and assignment and transfer of the unexpired term, held by one Carlton, in a certain public-house, and everything in, upon, and annexed to the house, for the sum of 60*l.* to be paid by the plaintiff for the same. Breach, that the defendant did not procure a sale, assignment, or transfer, of the term, or of everything in, upon, or annexed to the public-house.

There were, also, the common counts for money paid, money received to the plaintiff's use, and on accounts stated.

(1) Law Rep. 1 Ex. 91.

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Pleas to the first count non assumpsit, and a denial of the breach; and to the second count, except as to 20*l.*, never indebted. Issue thereon.

The case was tried before Byles, J., at the sittings in Middlesex after Trinity Term, when it was proved that the defendant was a public-house broker, and one Carlton, who was then tenant for an unexpired term of thirteen years of a public-house called the "Builders' Arms," being desirous of disposing of the residue of the lease, gave instructions to the defendant to endeavour to sell it. The plaintiff, being desirous of purchasing the lease, applied to the defendant, and on the 10th of March, 1869, he paid a deposit of 10*l.*, and obtained from the defendant the following document:— "Received from Mr. H. T. Horsey, 10*l.* by cheque, as a deposit upon the 'Builders' Arms,' Bermondsey New Road, subject to my being able to obtain lease, fixtures, utensils, and possession for 50*l.*; otherwise, deposit aforesaid to be returned." The brewers, Messrs. Crossman & Co., to whom Carlton was indebted, and who were mortgagees of the lease, having objected to the terms, further negotiations ensued, and on the 15th a further document was signed by the defendant, and given to the plaintiff, in the following terms:—

"Messrs. Mann, Crossman & Co., having refused to see Mr. Horsey into the "Builders' Arms," New Road, for 50*l.*, Mr. Horsey now informs me he can muster 60*l.* cash; such being the case, *subject to their approval*, I hereby agree to get the lease and everything, for such sum of 60*l.* cash." When this document was produced at the trial, the words "subject to their approval," which were interlined had been erased, and there was conflicting evidence whether the erasure took place before or after the document was signed and delivered to the plaintiff.

On the 16th, an interview took place between the plaintiff and defendant's clerk; the conversation which passed was relied on by the plaintiff as amounting to a parol agreement to procure for him the lease and other matters, for the 60*l.* unconditionally.

On the 17th of March, the defendant wrote to the plaintiff a letter, in which he said "Consider your matter settled."

Byles, J., left to the jury whether the erasure had taken place after the document of the 15th was signed and delivered over; and, secondly, whether there was an unconditional parol agreement.

The jury found a verdict for the plaintiff for 50*l.* besides the deposit, but stated that they were divided on the question when the erasure had been made; and the judge gave the defendant leave to move to enter the verdict on the ground that the agreement was one which required to be in writing, under s. 4 of the Statute of Frauds, and there was no sufficient memorandum of it.

Garth, Q.C., obtained a rule accordingly, to enter the verdict for the defendant, and relied on *Hodgson* v. *Johnson* (1), as shewing the contract was within the 4th section of the Statute of Frauds.

H. James, Q.C., and *F. Turner*, shewed cause. First, this contract is not one which requires to be evidenced by writing; it is not a contract to give the plaintiff an interest in land, but to render him certain services by procuring him such an interest; it is a contract to procure a sale of the lease, but not to make a sale of it. In all the cases in which a writing has been held necessary, the defendant has been possessed of some interest in the land which he was to give up under the contract; this was the case in *Hodgson* v. *Johnson* (1), relied on by the defendant, and also in *Cocking* v. *Ward* (2); in the present case the defendant had no interest in the land. The nearest case appears to be *Savage* v. *Canning*. (3) There, the plaintiff entered into an agreement to procure the sale of an estate to the defendant, and the defendant agreed to give him the difference between what it was purchased for and 26,000*l.*, and to grant him a lease of a quarry on the estate. The sale having been completed, it was held that the plaintiff could not recover on the special contract, because it contained as one of its terms a provision to grant a lease of the quarry; but it was decided that the plaintiff could recover remuneration under a count for work and labour for his services in negotiating the sale.

[BRETT, J. In that case the special contract being executed by means of the plaintiff's exertions, a fresh contract arose in law, to pay for the services of the plaintiff which the defendant had actually enjoyed. In the present case, the plaintiff is seeking to obtain damages for the breach of the special agreement.]

(1) E. B. & E. 685; 28 L. J. (Q.B.) 88. (2) 1 C. B. 858.
4 Jur. N.S. 290 (3) 1 Ir. L. Rep. C. L. 434.

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In *Wright* v. *Stavert* (1), Crompton, J. gives as the test by which it is to be decided whether the contract is within the statute, whether as soon as the agreement is come to there is created an interesse termini which would amount to a demise as soon as executed by the entry of the proposed occupier.

[BRETT, J. That may have been the test in that case, but it cannot be the sole test in all cases.

BOVILL, C.J. Under the Stamp Acts (55 Geo. 3, c. 184, sch. part 1, tit. Agreement), where the words are "memorandum, letter, or agreement made for or relating to the sale of any goods, wares, or merchandise," it has been held that a guarantee is a contract within the Act, and that bears some analogy to the present case].

The words of the Statute of Frauds are less general, and are to be construed strictly, while the words in the Stamp Acts, as they refer to an exception in favour of the subject, are to be construed liberally. In *Rein* v. *Lane* (2), it was held that the words of 5 & 6 Vict. c. 79, s. 2, and sch., "charterparty or agreement for the charter of any ship, or any memorandum, letter, or other writing between the captain and owner of any ship and any other person for or relating to the freight or conveyance of goods, &c., on board such ship," must be construed strictly, and confined to letters and other writings which were themselves equivalent to a charterparty.

[BRETT, J. In that case, in which I was counsel, we relied strongly on the fact that the Act was a consolidation Act, and the earlier statutes, which there appeared to be no intention to alter, were clearly confined to documents which were in the nature of charterparties].

THE COURT then called on

Garth, Q.C., and *A. L. Smith*, in support of the rule. There appears to be no case exactly in point, and the nature of the agreement is exceptional, but the fact that the defendant had not himself an interest in the land can hardly be decisive. In *Kelly* v. *Webster* (3) Maule, J., says, "Where anything is done which substantially amounts to a sale or parting with an interest in land, the contract

(1) 2 E. & E. 721; 29 L. J. (Q.B.)161. (2) Law Rep. 2 Q. B. 144.
(3) 12 C. B. 283, 290; 21 L. J. (C.P.) 163.

(1) sc 6 Jur NS 867

is within the 4th section of the Statute of Frauds." Here, the very gist of the agreement was, that the plaintiff was to obtain an interest in land.

[BOVILL, C.J. If we are in favour of the defendant on this point, there must be a new trial; we cannot assume that the document of the 15th was signed either with or without the erasure.]

If the document of the 15th would be an insufficient memorandum, even with the erasure in it, then the defendant is entitled to enter the verdict; and it is insufficient, for it does not state what lease of the premises is to be obtained for the plaintiff, and if that might be supplied by parol evidence the word "everything" is far too indefinite. If this document be held sufficient it will give rise to all the inconveniences the statute was intended to prevent, for if a dispute arise as to whether the defendant has obtained for the plaintiff all that he agreed to obtain for him for the 60*l*., there will be no means of deciding the question except by parol evidence.

BOVILL, C.J. The contract relied on by the plaintiff in this case was a contract by which he was to acquire a lease of, and therefore an interest in, the land. It is said that the defendant had not any title to the land himself; but an ordinary contract for the sale of land is always alleged as a contract by the vendor to made a good title, and does not necessarily imply that the vendor has the title himself, and if there are outstanding terms or mortgages, the vendor gets them assigned and so makes a good title; such a case is very similar to this. It seems to me the object of the contract here was to give the plaintiff the interest in the public-house. It would be defeating the very object of the statute if we were to express a doubt of a contract of this nature being within it.

The absence of any case on the subject seems to me to arise from the matter being too clear for any doubt to have been felt about it. So far as authority from analogy is concerned, I think the cases on the Stamp Act are strongly in the defendant's favour. They have decided that a guarantee is a contract relating to the sale of goods, and the case of *Rein* v. *Lane* (1) is quite distinguishable on the

(1) Law Rep. 2 Q. B. 144.

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grounds stated by my Brother Brett in the course of the argument. In *Lawrence* v. *Price* (1) it seems to have been assumed that the contract required to be in writing, and yet it was, in fact, only a contract to get an interest in the land conveyed, since the defendant had really no interest in it; and a writing has been held necessary upon the sale of an equity of redemption: *Massey* v. *Johnson*. (2) I think, therefore, the rule must be absolute for a new trial so far as this point is concerned. Then, upon the evidence and the finding of the jury, it is impossible to say what is the contract which is to be enforced. Mr. Garth says that taking the view of the evidence most unfavourable to him, the written memorandum of the 15th is not sufficient. He first says that it is too indefinite, because it does not state for what term the lease is; but it is always allowable to shew what is the matter respecting which the contract is made, and a contract for the sale of Blackacre is indefinite till it be shewn what Blackacre is. Then he said that the word "everything" is too indefinite; but it will be rendered definite as soon as it is known what the parties are contracting about, and here that is to be found in writing in the memorandum of the 10th of March. It seems to me, therefore, that if the memorandum of the 15th was delivered with the words struck out, there was a sufficient contract in writing. With regard to the letter of the 17th, the effect of that will depend upon the state in which the document of the 15th was when it was delivered, and we cannot, therefore, tell what its effect is till the jury have found what is the truth upon that point. (3) I think, therefore, that this case must go down to a new trial.

KEATING, J. I am of the same opinion. With reference to the point that has been so much argued, namely, whether this was a contract that required to be in writing, I do not intend to dissent from the rest of the Court; at the same time, I should feel much more clear if any authority for it had been produced. My doubt arises on the words of the statute: "any contract or sale of any

(1) 1 Ry. & Mood. 198.

(2) 1 Ex. 241; 17 L. J. (Ex.) 182.

(3) *James, Q.C.*, and *F. Turner*, were prepared, when they were stopped by the Court, to argue, that in whatever state the document of the 15th was when it was delivered, the documents of the 10th, 15th, and 17th, together constituted a sufficient memorandum of the contract. The Court, however, heard no argument upon this point.

interest in or concerning land." No case has been adduced in which the party to the contract did not part with some interest in land; but I do not feel strongly enough on the subject to lead me to dissent. If, then, this is a contract within the statute, it is impossible that we should give judgment without knowing what was the written memorandum on which we have to decide. I would go further, and express my individual opinion that if the parol contract was to be relied on, the evidence of such a contract was wholly unsatisfactory, and such as the Court could not have regarded as sufficient. The plaintiff, however, relied on a written contract, and it is impossible for us to give judgment upon that without knowing what was the written memorandum on which we have to decide, and that the jury have not found; and I think, therefore, there must be a new trial.

BRETT, J. I am of opinion that the plaintiff could not recover upon proof of a mere verbal agreement. It seems to me that in this case the primary and direct object of the agreement was an interest in land to be given to the plaintiff. He does not bring his action for work and labour, or sue the defendant for not having used his best endeavours to procure the lease, but the action is for the damages he has sustained by reason of his not having obtained the interest in land which he was entitled under the agreement to receive. It is impossible, therefore, as it seems to me, to say that the contract sued upon was not a contract or sale of an interest in land. The case of *Savage* v. *Canning* (1) is rather against the plaintiff, for it was there held that the plaintiff could not recover upon the special contract, although the Court held that such contract having been executed, an implied contract (which could be enforced) arose to pay for the work and labour which had been enjoyed by the defendant. The case most in the plaintiff's favour is *Rein* v. *Lane* (2), but that is distinguishable on the grounds which I stated during the argument. I agree with my Lord that the cases on the Stamp Act afford a strong analogy to the present one, and are in the defendant's favour.

I also agree with my Brother Keating, that the evidence of a parol agreement was so unsatisfactory that the Court would have

(1) 1 Ir. L. Rep. C. L. 434. (2) Law Rep. 2 Q. B. 144.

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set aside the verdict on that ground if it had rested only on the parol contract.

Under these circumstances there must be a new trial, that the jury may find the truth concerning the erasure in the document of the 15th.

BYLES, J. I am of the same opinion. I think this case is clearly within the 4th section of the Statute of Frauds, and as the jury could not, or would not, find what was the truth with respect to the written contract, we cannot tell how the verdict shall be entered.

Rule absolute for a new trial.

Attorney for plaintiff: *G. Brady.*
Attorneys for defendant: *Shum & Crossman.*

Nov. 10.

EX PARTE JANE MENHENNET.

Fines and Recoveries Act, 3 & 4 *Wm.* 4, *c.* 74—*Examination before One Commissioner—His Death—Absence of Affidavit.*

Where one of two commissioners who had taken the acknowledgment of a deed by a married woman was interested, and had taken no part in the examination, and in consequence of the death of the other commissioner (who was not interested) the affidavit required by Rule 3 of Hilary Term, 4 Wm. 4, could not be made,—The Court refused to allow the certificate of acknowledgment to be filed.

Semble, that, except in cases of reasonable necessity, both the commissioners ought to be disinterested.

ONE of two commissioners who had taken the acknowledgment of a deed by a married woman, being interested in the transaction as solicitor for the lady, took no part in her examination. Both commissioners signed the certificate required by s. 84 of 3 & 4 Wm. 4, c. 74; but, by reason of the death of the commissioner who was not interested, and by whom the separate examination required by the Rules of Hilary Term, 4 Wm. 4, was made, without his having made the prescribed affidavit, the transaction could not be completed in strict accordance with those rules.

Willoughby moved that the proper officer might be directed to file the certificate of record, upon an affidavit by the surviving

commissioner deposing to the facts within his knowledge. He submitted that the strict requirements of the Rules of Court might in case of necessity be dispensed with: and he referred to *In re Scholefield.* (1)

[BOVILL, C.J. The 79th section of the Act requires the acknowledgment to be taken before a judge of one of the superior Courts, or a master in Chancery, or before *two* commissioners.]

The rule of Court shews that the examination of the married woman may be made by one of the commissioners, where the other commissioner is interested in the transaction: and that is what took place here.

[WILLES, J. The 17 & 18 Vict. c. 75, s. 1 (2), may be taken to be a legislative declaration that the acknowledgment should be taken before both the commissioners.

BYLES, J. The attorney concerned in the transaction should not act as one of the commissioners.]

It is almost the universal practice for the attorney so to act; and in many cases it is difficult to obtain the services of two disinterested commissioners.

(1) 3 N. C. 293; 3 Scott, 657.

(2) That Act, after reciting the provisions of the 3 & 4 Wm. 4, c. 74, as to acknowledgments of deeds by married women, and that "it is apprehended that deeds executed by married women under the provisions of the said Act may be liable to be invalidated by the circumstance that the judge, or master in Chancery, or one or both of the commissioners taking the acknowledgment, may be or may have been interested or concerned, either as a party or otherwise, in the transaction giving occasion for such acknowledgment, and it is not expedient that deeds executed in good faith under such circumstances should be invalidated," enacts, in s. 1, that "no deed which has been acknowledged or which shall hereafter be acknowledged by a married woman before a judge of one of the superior Courts of Westminster, or a master in Chancery, or before two of the perpetual commissioners, or two special commissioners appointed as by the said act is required, shall be impeached or impeachable at any time after the certificate of such acknowledgment has been filed of record in the Court of Common Pleas at Westminster, by reason only that such judge, or master in Chancery, or such commissioners, or either of them, was or were interested or concerned, either as a party or parties, or as attorney or solicitor, or clerk to the attorney or solicitor, of one of the parties, or otherwise, in the transaction giving occasion for such acknowledgment."

Sect. 3 enables the Court of Common Pleas from time to time to make any Rules which to them may seem fit for preventing any commissioners interested or concerned as aforesaid from taking any acknowledgment under the recited Act.

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BOVILL, C.J. The Rule of Hilary Term, 4 Wm. 4, construed with the Act of 17 & 18 Vict. c. 75, must not be considered as approving or confirming the practice of taking acknowledgments by an interested commissioner. Except in cases of reasonable necessity, at all events, both of the commissioners ought to be disinterested, and the acknowledgment should be taken before both. The whole proceeding here is irregular.

WILLES, J. The 17 & 18 Vict. c. 75, was passed in consequence of doubts being entertained whether this Court had not power to quash or remove from the file the certificate where the acknowledgment had been taken before a person who was interested in the transaction. It was not intended to justify the commissioners in acting irregularly; but merely that an innocent purchaser should not be prejudiced by the irregularity. It is true, the Rule of Court provides that, "where any acknowledgment shall be made by any married woman of any deed under and by virtue of the said Act before commissioners appointed under the said Act, one at least of the said commissioners shall be a person who is not in any manner interested in the transaction giving occasion for such acknowledgment, or concerned therein as attorney, solicitor, or agent, or as clerk to any attorney, solicitor, or agent so interested or concerned." But that does not help the applicant, because here the examination took place before one commissioner only, and there is no affidavit by him.

BYLES, J., concurred.

Rule refused.

Attorney for applicant: *T. H. Strangways.*

VIVIAN AND OTHERS *v.* THE MERSEY DOCKS AND HARBOUR BOARD. 1869 Nov. 11.

Mersey Dock Acts Consolidation Act, 1858, *Construction of—Wreck—Lien of the Board on Cargo saved by them.*

The 59th section of the Mersey Dock Acts Consolidation Act, 1858 (21 & 22 Vict. c. xcii.), impowers the defendants to raise, destroy, &c., any "wrecks of vessels and any vessels that shall be sunk in any dock, &c., within the port of Liverpool," which may be an obstruction to the navigation, and, in case the master or owner of "such vessel or other obstruction" shall neglect to pay the charge of removing "the same" for the space of three days after demand, to sell "the same," and out of the proceeds retain the expense incurred in raising, destroying, &c., "such wrecks or other obstructions," rendering the overplus to the person entitled to the same.

The ship *Swansea* came into collision with another vessel and was sunk in the Mersey, within the port of Liverpool, having on board copper ore and other goods belonging to the plaintiffs. The defendants took possession of the wreck, which obstructed the navigation, and claimed the exclusive right of dealing with ship and cargo. A portion of the cargo (worth about 1200*l.*) was raised by them from the wreck, at a cost of 294*l.* 14*s.*, and they ultimately blew up and destroyed the hull of the vessel and the rest of the cargo. The expense incurred by them in removing the obstruction caused by ship and cargo was about 4500*l.*:—

Held, that the defendants were not entitled to detain the plaintiffs' goods to indemnify themselves for the costs incurred in the destruction of the ship, of which the plaintiffs were not the owners.

SPECIAL CASE stated for the opinion of the Court under a judge's order, without pleadings.

1. On the 21st of December, 1867, the steam ship *Swansea* came into collision with the steamer *Magnetic*, and was sunk in the Mersey, within the port of Liverpool, and was and continued to be when so sunk an obstruction to the safe and convenient navigation of the port.

2. The *Swansea* at the time she was sunk belonged to John Bacon, of Liverpool, and had on board a cargo consisting, amongst other goods, of silver and copper ores, and barilla, a portion of which belonged to the plaintiffs.

3. The defendants are a corporate body constituted under The Mersey Dock Acts Consolidation Act, 1858 (21 & 22 Vict. c. xcii.), to which either party was to be at liberty to refer on the argument. By s. 59 of that Act it is provided that "the board may raise, destroy, remove, and take away any wrecks of vessels, and any vessels that shall be sunk in any dock or elsewhere within the

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port of Liverpool, or in any of the sea channels leading thereto, and be in their judgment an obstruction to the safe and convenient navigation or use thereof, and may also remove any stone, timbers, anchors, or other obstructions or impediments to such navigation that may be found or arise therein; and, in case the master or owner of such vessel or other obstruction shall refuse or neglect to pay the charge of removing the same for the space of three days after demand, or in case any such master or owner cannot be found, then the board may sell the same, and out of the proceeds of such sale retain the expenses incurred in raising, destroying, and removing such wrecks or other obstructions, and the charges of detainer and sale, rendering the overplus to the person entitled to the same; and, if from such proceeds sufficient to pay the aforesaid charges shall not be recovered, then the deficiency shall be recoverable from the master or owner of such vessel or articles so raised, destroyed, or removed, in like manner as penalties are by this Act authorized to be recovered."

4. Shortly after the sinking of the *Swansea*, arrangements were made by the plaintiffs with the Liverpool Steam-Tug Company for the recovery of their goods by removing and raising them from the wreck of the *Swansea*. Under these arrangements, 218 bags of barilla (being a portion of the plaintiffs' goods) were raised and landed; and a further portion might have been raised and recovered under the aforesaid arrangements, when the defendants took possession of the wreck, and claimed the exclusive right of dealing with the *Swansea* and the cargo on board of her.

5. The 218 bags of barilla have been delivered to the plaintiffs.

6. The defendants so intervened and took possession of the wreck with a view of removing with all possible dispatch the obstruction which the wreck of the *Swansea* caused to the safe and convenient navigation of the port of Liverpool.

7. In answer to the complaints of the plaintiffs with reference to these proceedings, the following letter was sent to them on behalf of the defendants:—

"Marine Surveyor's Office, 28 Dec. 1867.

"Referring to the subject of our interview this morning, I beg to inform you that, after full consideration of the circumstances of the case, I feel that I cannot properly delay any longer the making

of such arrangements as may be necessary for the removal or destruction of the wreck. Referring to your mention of Messrs. Vivian, I beg to say that I cannot regard their interest in the matter. The cargo, as one of the incidents of the wreck, is liable along with the rest for the expenses of removal. Incidentally to such removal, I may find it necessary to raise some part of the cargo in the first instance; and, if any persons claiming to act for owners or consignees of cargo wish to interfere, they must first furnish me with a sufficient indemnity to cover all expenses that I may eventually incur in the removal or destruction of the hull.

(Signed) "Graham H. Hill."

The Messrs. Vivian mentioned in this letter are the plaintiffs. The indemnity referred to was not given by the plaintiffs.

8. A few days after the defendants took possession of the wreck of the *Swansea* they ordered a survey to be held; and, as it was found that the sand had banked round the vessel to such an extent that it was impossible to get chains under her so as to raise her, the defendants determined to lighten her of some of her cargo. Accordingly, on or about the 1st of January, 1868, the defendants proceeded to remove portions of the cargo from the wreck, and to bring them ashore, and continued doing so until the 22nd.

9. Between the 1st and the 22nd of January, the defendants raised and landed a portion of the plaintiffs' goods, viz. the goods which are the subject of this action; and the expenses which they incurred in so doing amounted to 294*l.* 14*s.*

10. On the 22nd of January the tides no longer suited for the raising of cargo, on account of its being low-water at night. On the 30th the tide again answered; but it was found that the hatchway from which the goods had been previously removed was filled up with sand, and the defendants, who expected that if they opened another hatchway it would likewise in a very short time fill with sand, resolved to abandon and did abandon all attempts to remove and raise any more cargo.

11. After having wholly abandoned all attempts to remove any more cargo, the defendants proceeded, in February, 1868, to make attempts to raise the wreck by means of chains which were placed under the vessel; and these attempts were continued until the following July, but were unsuccessful.

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12. In May, 1868, the plaintiffs applied to the defendants for the delivery of such of their goods as had been raised and landed by the defendants between the 1st and 22nd of January, and at the same time tendered to the defendants 294*l.* 14*s.*, being the expenses which the defendants had incurred in raising and landing those goods.

13. The defendants refused this tender, and also refused to deliver the goods to the plaintiffs, but made them the proposal contained in the following letter:—

"Marine Surveyor's Office. May 4th, 1868.

"Wreck, *Swansea.*

"Your letter of the 7th of March, offering to pay charges on certain cargo removed from the wreck of the steamer *Swansea,* sunk in the channel of the Mersey, or to guarantee whatever may be found to be due (together with the several representations made to me on your behalf by Captain Edgell), has been considered by the Marine Committee, and I am instructed to reply thereto.

"Your letter states generally your authorization as representative of owners and underwriters of *Swansea's* cargo, without specifying the particulars of cargo subject to such authority; therefore it is assumed, subject to your correction, that you represent the owners' interest in the whole of the cargo shipped for Messrs. Vivian, which, according to the best information I can obtain, was nearly as follows:—Copper ore in bulk, 285 tons; Barilla in bags, 29 tons; Silver ore, 5 tons, 18 cwt.,—total, 319 tons, 18 cwt.: and of this cargo the portion removed from the wreck and now in the custody of the board is, Copper ore in bulk (estimated at) 13 cwt., Barilla in bags (estimated at) 16 tons, 12 cwt., Silver ore (estimated at) 3 tons, 5 cwt.,—estimated total, 19 tons, 18¾ cwt.: so that, of the whole cargo included in your ownership, only about one eighteenth part has been removed, and fourteen-fifteenths still remain as an obstruction in the channel.

"Under these circumstances, it is impossible at present to render account of what may be found to be due from the owners of the cargo: but, as further proceedings must necessarily be tedious, the Marine Committee have instructed me to say that they are anxious to meet as far as possible the wishes of the owners, and that, provided public funds intrusted to their administration are properly

protected, they will not object to the delivery up to you of the portion of cargo in their custody. By inquiry of the agent of Messrs. Vivian, and others interested, the value of the *Swansea's* cargo has been approximately ascertained; and it appears that the portion now in custody of the board, for which you claim, is worth nearly 1200*l.*

"The portion of expenses already incurred, calculated rateably according to that value, amounts to 294*l.* 14*s.*, or in round numbers 300*l.*; and the committee are of opinion that if, in addition to that sum, a like amount were paid down to cover the risk of deficiency in removing and realizing the remainder of the property which you claim to represent, the justice of the case would be met; and upon such payment they would be willing to release from all lien the cargo now in the board's custody,—the proposed sum of 600*l.* to be carried to account, to be ultimately dealt with accordingly as the final result may shew surplus or deficiency.

(Signed) "Graham H. Hill."

The plaintiffs did not accept this proposal.

14. On the 20th of May, 1868, the defendants' solicitor sent to the solicitors of the plaintiffs the following letter:—

"Liverpool, 26th May, 1868.

"Copper ex *Swansea.*

"In this case the board removed from the sunken hull of the *Swansea* a quantity of ore of which a portion is, as I am informed, the property of Messrs. Vivian. The board are still working upon the hull, which is believed still to contain a further quantity of ore also belonging to Messrs. Vivian, forming part of the same shipment with that which was removed from the hull in the first instance; and it is quite possible that further quantities of Messrs. Vivian's ore may be removed from the hull. Under these circumstances, I submit that the operation must be regarded as still pending, and that the board cannot reasonably be required to give up the portion already removed, until they have finished the work, and are in a position to render a statement of the entire charges applicable to the cargo removed.

"You will, I think, agree with me, that, where the process of removing cargo is going on day by day, it would not be reasonable that the owner should at the end of any day be able to come to

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the board and say, 'Here is the money you have spent to-day in removing this particular bit of my cargo, which is very valuable: give it to me,' when on the following day the cargo removed might not be worth half the sum expended in getting it.

"I will admit that a tender of 300*l.* was made to the marine surveyor of the board, in respect of the expenses incurred in removing the portion of Messrs. Vivian's cargo which had been obtained up to that time. If you determine to sue, you may issue your writ and send it to me.

(Signed) "A. T. Squarey."

15. All the attempts which were made between February and July, 1868, to raise the wreck by means of chains failed.

16. Between the 22nd of January and the 13th of July, 1868, no cargo whatever was raised by the defendants. In fact, they did not during that time make or contemplate making any attempt to remove from the wreck or raise separately from the wreck any goods whatsoever: and no inference to the contrary was to be drawn from the letter of the 26th of May, 1868.

17. In July, 1868, the attempts to raise the *Swansea* by means of chains having wholly failed, the defendants determined to blow up the wreck, and accordingly commenced blasting operations on the 13th of that month. These operations were continued, as the weather and tides permitted, until the 9th of November, by which time the whole of the wreck, including cargo, was blown up, with the exception of certain goods which were during the blasting operations removed from the vessel, as hereinafter mentioned.

18. During the blasting operations, as parts of the vessel were blown up, and as portions of the cargo on board became exposed, such goods as could be readily got at were removed from the vessel and brought ashore. These goods, amounting in value to about 212*l.*, included some of the plaintiffs' goods, which however are not the subject of this action. The whole of the expenses incurred by the defendants in blowing up and removing the wreck of the vessel and cargo amounted to 4485*l.* 12*s.* 10*d.* No part of this expense was incurred separately or specially in and about the recovery of the goods which were brought ashore during the blasting operations: but, if the defendants had not saved these goods by removing them from the *Swansea* and bringing them ashore, the total ex-

pense incurred by them would have been less than 4485*l.* 12*s.* 10*d.*, by 40*l.* or 50*l.*

19. On the 20th of November, 1868, after the whole of the wreck had been blown up and removed, the defendants sent the following letter to the owner of the *Swansea* :—

"Marine Surveyor's Office, 20 Nov. 1868.

"I beg to inform you that subsequently to the notice which I gave you on the 21st of December, 1867, of the danger caused to the navigation by the sinking of your steamer *Swansea* in the Crosby Channel, as no steps were taken by yourself for removal of the obstruction, the water-bailiff of the Mersey Docks and Harbour Board proceeded, under my direction, and with the sanction of the commissioners for the Mersey conservancy, with the operations necessary for the safety of navigation. These proceedings have now been completed by the total destruction of the vessel. For the charges incurred in abating this obstruction to the navigation of the Mersey, the owners are liable to the board.

"The charges incurred, including an estimated per-centage to be paid to the Liverpool Steam-Tug Company on the value, when ascertained, of a quantity of ore saved from the wreck, amount to 4564*l.* 15*s.* 9*d.*, which has been reduced by a payment made by the underwriters of a part of the cargo on a cask of silver ore, and by sale of some old materials recovered from the wreck, to 4515*l.* 5*s.* 8*d.*

"A tender has also been made by the owners of the greater part of the cargo saved, of salvage on the said cargo to the amount of 300*l.*, by which the balance is reduced to 4215*l.* 5*s.* 8*d.*

"I may add, for your information, that this board has claimed to hold the whole of the cargo saved, against the entire charge incurred; but the parties interested in such cargo are contending that cargo is only liable for expenses actually incurred in raising it, and not for expenses incurred on the wreck of the vessel. This question is now in course of decision; and, if the position taken by the board is sustained, the sum payable by you will be reduced by the net proceeds of the cargo saved. The value of the cargo involved in the question to which I have referred may be estimated at 1000*l.*, leaving 3215*l.* 5*s.* 8*d.*, which will in any case be payable by you to the board. I have, therefore, to request that this amount may be paid at your earliest convenience to the treasurer, leaving

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the remainder of the claim open pending the result of the proceedings in respect of the cargo.

"Besides the cargo above referred to, chain cable broken in pieces, about 90 fathoms, three anchors, and some other articles of trifling value, estimated to be worth altogether about 35*l.*, are lying at the Toxteth Dock, and will be given up to you on your payment of the sum now demanded, but otherwise will be sold, and the amount credited to the wreck, after three days from this date. (Signed) "Graham H. Hills."

20. It was agreed that the Court should have power to draw all such inferences of fact as a jury ought to have drawn.

The question for the opinion of the Court was, whether the defendants were entitled, under the powers conferred upon them by the Mersey Dock Acts Consolidation Act, 1858, to refuse to deliver to the plaintiffs the goods of the plaintiffs which were raised and landed, as before mentioned, between the 1st and 22nd of January, 1868.

Sir G. Honyman, Q.C. (*J. C. Mathew* with him), for the plaintiffs. The sunken vessel being an obstruction to the navigation, the defendants might under the authority vested in them by the act of parliament raise or destroy her at her owner's expense; and it may be that, as incidental to that operation, they might raise the cargo; but there is no provision in the Act which enables them to charge the owners of the cargo with the expense of removing or raising either ship or cargo. They may "raise, destroy, remove, and take away any wrecks of vessels and any vessels that shall be sunk" and be in their judgment an obstruction to the navigation; and they may "remove any stone, timbers, anchors, or other obstructions or impediments to such navigation." The obstructions or impediments there spoken of must be obstructions or impediments ejusdem generis. The language is not such as the legislature would be likely to use with reference to "cargo."

[BRETT, J. May the board destroy the cargo, if its destruction be necessary for the removal of the wreck?]

Possibly they may, as incident to the duty cast upon them of removing the vessel. But the question is, at whose expense is that to be done? The first part of s. 59 clearly cannot apply to goods.

[KEATING, J. The interpretation clause (s. 3), in defining the meaning of "vessel," does not speak of "cargo:" and, in defining the meaning of "owner," it makes a distinction between the owner of the vessel and the owner of the goods.]

The second branch of the section, which enables the board to sell the salvage, and to charge the master or owner with the expense incurred in excess of the sum realized, is also applicable solely to the owner of the ship or other obstruction. The case does not find that the goods were an obstruction to the navigation. The hull of the vessel would equally obstruct whether with or without cargo.

[BRETT, J. The cargo necessarily adds to the difficulty of raising the ship which is the obstruction.]

At all events, the defendants had no right to detain the goods which were saved, after the plaintiffs had tendered them the expense of their recovery. Their claim to hold them as a security for the expense incurred in raising or destroying the ship was clearly wrongful.

Quain, Q.C. (*Maclachlan* with him), contrà. The object of the provision in question was, to enable the board to remove all impediments to the free navigation of the port of Liverpool; and the power to charge the owners of that which causes the obstruction with the expense incurred in its removal, is given as incident to the power and the duty vested in and imposed upon them as a public body to keep the navigation free and unobstructed. The first part of s. 59 impowers them to remove "any wrecks of vessels." Those words are not necessarily confined to the ship itself, but have a far wider meaning. Lord Coke, commenting upon the statute West. 1 (3 Edw. 1), c. 4, says (1): "Wreck of the sea in legal understanding is applied to such goods as after shipwreck at sea are by the sea cast upon the land." The wreck or obstruction here is, the ship and the cargo. The second part of s. 59 gives the board power to recoup themselves the expenses incurred in the removal of the obstruction. The language used is undoubtedly somewhat obscure; but, taking the whole together, and giving a reasonable interpretation to the language used, it plainly means that the power of sale shall extend to the cargo,—the "wreck" as

(1) 2 Inst. 167.

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it lies,—though it may be that, when it is sought to enforce the remedy for any deficiency, recourse must be had to the owner of the vessel. The governing idea is, the removal of the obstruction and the reimbursement of the board for the expenses incurred. The Act vests in the board the complete and absolute control over the navigation of the port, whether docks or river: ss. 53, 54. Whatever obstructs the navigation is the thing which the board are impowered to sell: s. 89.

[BOVILL, C.J. Sections 216 and 217, which relate to combustible goods, shew that, where the legislature intended to make a distinction between the owner of goods and the owner or master of the vessel, they do so in terms.]

Sir G. Honyman, Q.C., in reply. The act of parliament was obtained by the board; and it gives them very extensive powers, and before they are exercised the Court must see that they are given in clear and unambiguous words. The penalty clauses (ss. 336—338) contain very stringent provisions against defaulters, which clearly could not have been intended to apply to the owners of cargo.

[WILLES, J., referred to the judgment of Maule, J., in *Brown* v. *Mallett* (1), and to the observations thereon of Alderson, B., in *White* v. *Crisp.* (2) He also referred to the case of *The Carrier Dove*, *Trask* v. *Maddox* (3), to shew that there is no distinction between river and sea salvage, notwithstanding the case of *Nicholson* v. *Chapman* (4), in which it seems to have been held otherwise.]

Cur. adv. vult.

Nov. 11. BOVILL, C.J. Having had an opportunity of considering this case, I have come to the conclusion that the plaintiffs are entitled to judgment. The question submitted to the Court is, whether the defendants were entitled, under the powers conferred upon them by the Mersey Dock Acts Consolidation Act, 1858, to refuse to deliver to the plaintiffs the goods of the plaintiffs which were raised and landed by the defendants, under the circumstances mentioned in the special case, between the 1st and 22nd of January, 1868. I am of opinion that the defendants were not entitled,

(1) 5 C. B. 599.
(2) 10 Ex. 312, 320.
(3) 2 Moo. P. C. (N. S.) 243.
(4) 2 H. Bl. 254.

under the powers of that act, to refuse to deliver the goods in question to the plaintiffs.

The case has been argued entirely upon the construction of s. 59 of the Act. On the part of the defendants it was contended that by force of that section they were of right entitled to detain and sell the cargo of the plaintiffs so recovered from the sunken vessel, not merely to recoup themselves the expenses incurred by them in raising the cargo, but also for the expenses incurred or to be incurred in attempting to raise or in destroying the hull of the ship itself. There is, no doubt, great difficulty in putting a construction upon the section which will make every part of it consistent: but, as I read it, I think there is nothing to be found in it which supports the construction contended for by the defendants. Assuming that "cargo," though not coming within the description of "stone, timbers, anchors, or other obstructions or impediments," does come within the earlier words "any wrecks of vessels," it does not necessarily follow that the defendants had power to detain and sell it for the purpose of satisfying the expense of raising or destroying the vessel itself. If the cargo be, by force of the latter part of the section, subject to detention and sale, it can only be in respect of the expense of raising the cargo. The section was probably framed with some relation to the general law applicable to the case of vessels sunk and other obstructions caused in such a position as to be an impediment to navigation, and so as not to be altogether out of or beyond the possession or control of the owner, as laid down in *White* v. *Crisp* (1), not inconsistently with the judgment of Maule, J., in *Brown* v. *Mallett.* (2) If the vessel is altogether out of the control of the owner, generally speaking he incurs no liability: but then comes in another right, viz. the right to salvage. It is, however, unnecessary to go into that question, or to inquire how far the owners of cargo are affected, because, assuming that "cargo" is within the first branch of s. 59, in any view of the case, the claim for salvage or for the expenses incurred in raising the goods must be confined to the particular portion of the cargo in respect of which those expenses have been incurred. That is taking the most favourable view of the rights and powers of the defendants. These expenses having been tendered, the defend-

(1) 10 Ex. 312. (2) 5 C. B. 599.

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ants were not justified in detaining the goods in question, and consequently there must be judgment for the plaintiffs.

WILLES, J. I am of the same opinion. The plaintiffs insisted that "cargo" is not within the terms of s. 59; and that, if it be so, at all events the power of detention and sale conferred upon the Mersey board must be read so as to operate against the owner of cargo in respect only of the expense incurred in raising the cargo, and not to give the board power to detain the cargo for the expense incurred in raising or destroying the ship or other cargo belonging either to the same or to other owners which happened to be on board. On the other hand, it was contended for the defendants (and it was necessary for them to make out both propositions) that "cargo" is within the first branch of s. 59, and the power to detain and sell general, giving a right to treat the whole ship and cargo as one obstruction, every portion of which is to be considered as forming part of a whole, as to which the powers of that section are to be exercised, and so as to create for this purpose a solidarity between the owners of the cargo and the owners of the ship. It appears from the case that, in point of fact, the owners of that portion of the cargo which was saved were willing, and offered, to pay all the expenses incurred in raising and saving that cargo; and, in substance, the defendants insisted on their right to be paid not only that but also the total expense they had incurred in respect of the destruction of the hull of the vessel. The overlying consideration in this case appears to me to be that the plaintiffs were willing to pay the expense incurred in raising that part of the cargo which was raised by the defendants. Assuming,—though for the purpose of this case it is unnecessary to decide the point,—that the first part of s. 59 of the Mersey Dock Act does include cargo, then I think that the power to detain and sell for expenses ought to be read distributively, and that cargo raised by the board ought to bear the expenses incurred in its recovery, irrespective of the expense incurred in raising or destroying the hull of the vessel or goods belonging to other persons. What the plaintiffs here offered to pay appears to me to be the equity of the transaction, and the true principle which ought to guide our decision.

KEATING, J. I also am of opinion that our judgment must be

for the plaintiffs. There is great difficulty in construing the section in question so as to make every part of it consistent with the rest: and upon this occasion it is unnecessary to decide whether or not "cargo" is within it. Assuming, however, that it is, I entirely agree with my Lord and my Brother Willes, that the proper way is to read the latter part of the section distributively, and that the owners of cargo, on payment or readiness to pay the expenses attendant on its recovery, were entitled to have it delivered to them. No doubt, some difficulty will arise where the cargo recovered is owned by several distinct persons: but I do not think that presents an objection to the conclusion we have arrived at, for the same difficulty arises in many cases where the amount of contribution is ordinarily settled by average-staters.

BRETT, J. I should be sorry to come to a decision which could in any way incroach on the powers of the board, because those powers have always been exercised by them for the benefit of the public. But I am unable to see my way to the conclusion which has been contended for by Mr. Quain. He insists that "cargo" comes within the words "wrecks of vessels," in the first part of s. 59, and that, under the latter part of the section, the board are impowered, "in case the master or owner of such vessel or other obstruction shall refuse or neglect to pay the charge of removing the same" (that is, the whole obstruction, ship and cargo), to sell "the same" (ship and cargo), and out of the proceeds of such sale retain the expenses incurred in raising, destroying, and removing such "wreck," that is, the whole obstruction. I think it is extremely difficult to say that cargo is within the section at all. But, assuming that it is, and that it is covered by the words "wrecks of vessels," it is quite impossible so to construe the section when the concluding part of it is looked at, "rendering the overplus to the person entitled to the same." It is impossible to hold that the ship-owner is entitled at that time to the overplus accruing from every part of the things recovered. Assuming "cargo" to be within the words "wrecks of vessels," it must also be within "vessel," and also within the words "such wreck" in the subsequent part of the clause. The expense of raising or destroying is to be charged to the person entitled to the overplus. I entirely

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agree with my Brother Willes, that the most equitable way of dealing with cases arising under this section is that pointed out by him.

Judgment for the plaintiffs.

Attorneys for plaintiffs: *Waltons, Bubb, & Walton.*

Attorneys for defendants: *Gregory, Rowcliffes, & Rawle, for A. T. Squarey, Liverpool.*

Nov. 24.

JONES *v.* BEWICKE.

Libel—General Plea of Justification—Particulars.

8 C.P. 568
5 H. & N.

In an action for a libel, the defendant pleaded that the defamatory matter in the declaration complained of was and is true in substance and in fact:—

The Court ordered him to give particulars of the facts and matters he relied on to justify the libel, or, in default, that the plea should be struck out.

THE first count of the declaration stated that the plaintiff was an attorney and solicitor, and that the defendant falsely and maliciously spoke and published of the plaintiff, and of him as such attorney and solicitor, and in relation to his conduct as such, the words following, that is to say, "He is a bankrupt swindler."

The second count charged the defendant with writing and publishing of the plaintiff the following words,—"Old perjury Jones, of Goring Place, Llanelly, South Wales," thereby meaning that the plaintiff had been guilty of the crime of wilful and corrupt perjury; and also the words following,—"Mr. Bewicke (thereby meaning the defendant) has only to repeat that the attorney Jones (thereby meaning the plaintiff) did perjure himself. An action for libel will only prove the truth of the above facts, and clearly demonstrate to the public the gross perjury of the above parties," (thereby meaning, among others, the plaintiff); whereby the plaintiff had been injured in his character, credit, and reputation.

Pleas: 1. Not guilty. 2. That the defamatory matter in the declaration mentioned and complained of was and is true in substance and in fact. Issue thereon.

A summons was taken out calling upon the defendant to shew cause why he should not give the plaintiff particulars of the facts

and matters he relied on under his second plea to justify the libels complained of, and why in default the second plea should not be struck out. In support of this summons the plaintiff swore that he had no knowledge whatever of any facts or matters upon which the defendant could rely in support of his plea. The summons was heard before Cleasby, B., on the 23rd of August last, when his Lordship dismissed it with costs, on the ground that the plaintiff had no right to be informed of the defendant's grounds of defence to the action.

Philbrick, for the plaintiff, obtained a rule nisi to the same effect.

E. P. Wood shewed cause. The order was refused by the learned judge on the grounds that it was unusual to grant particulars in an action for a tort, that the plaintiff must know perfectly well what he was charged with, and that his object was merely to delay the trial and embarrass the defendant.

Philbrick, in support of the rule, was not called upon.

BOVILL, C.J. The charge being so vague and general, I see no reason why the required particulars should not be given. How else is the plaintiff to know what charges he is to be prepared to meet?

KEATING, J. I doubt whether such a plea should be allowed at all. But, at all events, the plaintiff is entitled to particulars, in order to avoid unnecessary expense and miscarriage of justice.

MONTAGUE SMITH, J. The plea is clearly an embarrassing one, and ought not to be allowed without particulars.

Rule absolute.

Attorneys for plaintiff: *Fearon, Clabon, & Fearon.*
Attorney for defendant: *T. W. Parkes.*

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IN THE MATTER OF AN ARBITRATION BETWEEN FEARON AND FLINN.

Award—Excess of Jurisdiction—Ambiguity and Uncertainty.

Matters in difference between A. and B. were by agreement referred to arbitrators or an umpire, the costs of the submission, reference, and award to be in their or his discretion. A. claimed about 30*l.*; B. denied that he was indebted in any sum. The arbitrators having differed, the umpire made his award in favour of A. for 6*l.* 5*s.* 2*d.*, but directed him to pay B. his costs of the submission, and of the reference, and of the award, amounting to 13*l.* 4*s.* 3*d.*:—

Held, that the fact of the umpire having awarded that the successful party should pay these costs was no ground for setting his award aside.

Semble, that there was such ambiguity in the award as to what costs were intended, as would have induced the Court to send the matter back to the umpire if asked to do so.

MATTERS in difference between Fearon and Flinn relative to a loss on a cargo of coals were by an agreement of submission dated the 1st of June, 1869, referred to two arbitrators, and, in case of difference, to an umpire to be chosen by them. The agreement recited that Fearon claimed from Flinn 33*l.* 4*s.* as his share of the loss, and that Flinn "disputed that any such loss had occurred, and denied that he was indebted in any sum in respect thereof;" and it provided (amongst other things) that the costs of the agreement of submission and of the reference and award, should be in the discretion of the arbitrators or their umpire.

The arbitrators differing, an award was made by the umpire on the 16th of July, 1869, whereby he awarded that Flinn should pay to Fearon the sum of 6*l.* 5*s.* 2*d.*, in satisfaction and discharge of all the matters in difference. The award as to costs was as follows:—"And I do further award and adjudge that the costs of the said agreement, and of the reference, and of this my award, amounting to the sum of 13*l.* 4*s.* 3*d.*, shall be paid and borne by Fearon."

W. H. Butler moved to set aside the award on the grounds that the umpire had exceeded his authority, and that the award as to the amount of costs was ambiguous and uncertain, inasmuch as it did not distinctly shew what costs were intended. By the terms of the submission, the costs of the submission, reference, and award, are in the discretion of the arbitrators or umpire. But that discretion is to be exercised according to the known rules of law, and not arbitrarily and capriciously. To order the successful party to

pay costs to the unsuccessful litigant, is repugnant to every principle of justice. In *Rooke's Case* (1), treating of the authority of the commissioners of sewers to make assessments, it was resolved that, "notwithstanding the words of the commission give authority to the commissioners to do according to their discretions, yet their proceedings ought to be limited and bound with the rule of reason and law." In *Seccombe* v. *Babb* (2) and *Bartle* v. *Musgrave* (3) awards were set aside for excess of jurisdiction, because the arbitrators had directed that the costs should be taxed "as between attorney and client."

[BOVILL, C.J. In both those cases the reference was of the cause, and the arbitrator had no right to direct that the costs should be other than the ordinary taxed costs.]

In *Moore* v. *Watson* (4), on a compulsory reference of an action on contract, under s. 3 of the Common Law Procedure Act, 1854, the costs of the cause to abide the event, and the costs of the reference to be in the discretion of the master, the master having awarded the plaintiff a sum less than 20*l*., and directed the defendant to pay the costs of the reference, the Court held that he had exceeded his jurisdiction.

[BOVILL, C.J. Because the direction of the master as to the costs of the reference was contrary to the provision of the statute 13 & 14 Vict. c. 61, s. 11, the judgment being for a sum less than 20*l*.]

In *Finlayson* v. *M'Leod* (5), a cause was referred by order of nisi prius, the costs of the cause to abide the verdict, and the costs of the reference and of the special jury (which had been obtained at the instance of the defendant) to be in the discretion of the arbitrator. The arbitrator by his award directed a verdict to be entered for the plaintiff for a portion of his demand, and that he should pay the costs of the reference and of the *special jury*. The Court set aside the award as to the costs of the special jury, holding the fair meaning of the submission to be "that the arbitrator should have the power of allowing the costs of the special jury as costs in the cause, if the party who moved for the same were to succeed." It never could be held to be the fair meaning of this submission that the umpire should have the power of awarding to

(1) 5 Co. Rep. 99, b. (2) 6 M. & W. 129. (3) 1 Dowl. N. S. 325.
(4) Law Rep. 2 C. P. 314. (5) 1 B. & Ald. 663.

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the unsuccessful party the costs of his resistance of a just claim. Then, the award is bad, for uncertainty. It does not appear whether the 13*l.* 4*s.* 3*d.* awarded for costs is intended to apply to the costs of the award only, or to embrace the whole costs of the submission and reference as well.

BOVILL, C.J. I am of opinion that there is no ground for a rule on the first point. The parties have selected the tribunal which is to settle the disputes between them, and have agreed that the costs of the submission, reference, and award shall be in the discretion of the arbitrators or umpire. The umpire, who had all the facts before him, has exercised his discretion. Assuming his judgment to be wrong, what power have we to interfere? or how can we exercise a discretion in the matter? I am far from saying that the umpire has not arrived at a just conclusion. It may be that there was no dispute about the smaller sum, and that all the costs incurred in the reference resulted from the excessive claim made by Fearon: and in that case the umpire might well be justified in imposing all the costs upon him. But, be that as it may, we cannot sit in judgment upon his decision. This being so, all we could do as to the second ground of objection urged would be to send the award back to the umpire to state whether or not the sum mentioned was intended to cover the whole of the costs of the submission and reference, as well as the costs of the award. But, probably, Mr. Butler would not think that worth while.

KEATING, J. I am entirely of the same opinion. The parties have agreed to submit their differences to a tribunal of their own selection, and to abide by the decision of that tribunal. In *Finlayson* v. *M'Leod* (1), it was not denied that the arbitrator had power to order the costs of the reference to be paid in the manner he did: the objection was confined to the costs of the special jury. The case, therefore, is not an authority in support of Mr. Butler's argument.

Butler declining to take the case back to the umpire, the rule was

Refused.

Attorney for Fearon: *Worthington Evans.*

(1) 1 B. & Ald. 663.

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Nov. 3.

Bill of Exchange—Contract of Drawer—Oral Evidence Inadmissible to Vary or Contradict—Evidence.

7 QBD 637

To an action by payee against the drawer of a bill of exchange payable twelve months after date, the defendant pleaded that he drew the bill and delivered it to the plaintiff for the accommodation of the acceptor and as surety for him; that, at the time the defendant so drew and delivered the bill to the plaintiff, it was agreed between the plaintiff and defendant and the acceptor that the acceptor should deposit with the plaintiff certain securities, to be held by the plaintiff as security for the due payment of the bill, and that, in case the bill should not be duly paid, the plaintiff should sell the securities and apply the proceeds in liquidation of the bill, and that, until the plaintiff should have so sold the securities, the defendant should not be liable to be sued on the bill. The plea then went on to aver that the securities were deposited with the plaintiff by the acceptor, but that the plaintiff had not sold but still held them:—

Held (Willes, J., doubting), that oral evidence of the agreement alleged in the plea was not admissible, inasmuch as it contradicted or varied the express written contract on the face of the bill.

ACTION by the payee against the drawer of a bill of exchange for 200*l.* accepted by one Arthur Crux, payable to the order of the plaintiff twelve months after date.

Third plea, that the defendant drew the bill and delivered the same to the plaintiff for the accommodation of one Arthur Crux, and as surety for him for the payment of the said bill; that, save as aforesaid, there never was any value or consideration for the drawing, delivery, or payment of the bill by the defendant; that, at the time the defendant so drew and delivered the bill to the plaintiff, it was agreed by and between the plaintiff and defendant and Arthur Crux, that Arthur Crux should deposit with the plaintiff certain securities, to be held by the plaintiff as security for the due payment of the bill, and, in case the bill should not be duly paid, that the plaintiff should sell and dispose of the securities, and apply the proceeds thereof in payment and liquidation of the bill, and that, until the plaintiff should have so sold and disposed of the securities, the defendant should not be liable for or be sued upon the bill; that Arthur Crux deposited the securities as aforesaid with the plaintiff, and he received and had the same for the purpose and on the terms aforesaid; and that the plaintiff did not

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before the commencement of the suit sell, realise, or dispose of the securities or any part thereof, and the plaintiff still held the same. Issue thereon.

At the trial before Keating, J., at the sittings in Middlesex after last Easter Term, it was objected on the part of the plaintiff that the agreement alleged in the third plea (assuming it to have been made), not being in writing, did not sustain the plea, and that oral evidence of it was inadmissible: and *Young* v. *Austen* (1) was cited.

For the defendant, reliance was placed on *Pike* v. *Street*. (2)

The learned judge rejected oral evidence of the agreement, and a verdict was taken for the plaintiff for the amount of the bill, with leave for the defendant to move for a new trial if the Court should be of opinion that oral evidence was admissible to prove the plea; it being agreed that, if the point of law should be decided in the defendant's favour, a new trial should be had (for the purposes of costs to be treated as an adjournment) in order to try whether or not such an agreement was made as alleged.

H. James, Q.C., in Trinity Term, obtained a rule nisi.

Channell (*Huddleston, Q.C.*, with him), shewed cause. The oral evidence was rejected upon the authority of *Young* v. *Austen* (1), where this Court held a plea, setting up a similar condition in answer to an action upon the bill, to be good only upon the ground that the contemporaneous agreement must be assumed to have been in writing. The only possible distinction between that case and the present is, that there the action was against the acceptor, and here against the drawer. That this distinction makes a difference, however, is not suggested in *Hoare* v. *Graham* (3), *Free* v. *Hawkins* (4), *Moseley* v. *Hanford* (5), or *Foster* v. *Jolly* (6),—the authorities which are mainly relied on in Byles on Bills, 9th ed. 96, for the position that "no mere oral agreement can have any effect at law in controlling the instrument, if contemporaneous with the making of it; for, that would be to allow oral evidence to vary a written contract." The only case which bears a different

(1) Law Rep. 4 C. P. 553.
(2) M. & M. 226.
(3) 3 Camp. 57.
(4) 8 Taunt. 92.
(5) 10 B. & C. 729.
(6) 1 C. M. & R. 703.

aspect is *Pike* v. *Street*. (1) In Bayley on Bills, 6th ed., by Dowdeswell, p. 497, n., the case is thus observed on:—"This case seems to be at variance with *Hoare* v. *Graham* (2): but, as a verdict was found for the plaintiff, possibly the evidence of the agreement was of a very unsatisfactory nature, and therefore Lord Tenterden preferred leaving the matter to the jury. In *Foster* v. *Jolly* (3), Parke, B., refers this case to the class in which the consideration has been contradicted, and observes that evidence of the agreement was admissible, inasmuch as it negatived consideration between the indorser and indorsee. On these grounds it should not be regarded as a case impugning the position in the text." If there be a contract between the plaintiff and the defendant, it can only be the contract which appears on the face of the bill. In Byles on Bills, 187, 9th ed. (4), it is said: "A mere oral condition (at least, if contemporaneous with the acceptance) is inadmissible in evidence to qualify the absolute written engagement, even between the original parties. 'This would be,' says Lord Ellenborough, 'incorporating with a written contract an incongruous parol condition, which is contrary to first principles.' And, though the condition be *written* on a distinct paper, it cannot be available against an indorsee ignorant of the existence of such a paper." It being clearly settled that, as against the acceptor, the contract cannot be varied by a contemporaneous oral agreement, the only question is whether the same reasoning does not apply to any other party to the bill.

H. James, Q.C., in support of the rule. The evidence tendered was admissible upon two grounds; first, in order to shew what was the real consideration as between the parties; secondly, that the contract of the defendant as drawer and indorser was suspended until certain events mentioned in the plea had happened. The condition of a drawer or indorser is precisely the same: both are immediate parties. The drawer makes no contract in writing on the terms appearing on the face of the bill. He is simply a person writing a letter. He does not in terms contract to pay the in-

(1) M. & M. 226.
(2) 3 Camp. 57.
(3) 1 C. M. & R. 703, 708.
(4) Citing *Hoare* v. *Graham*, 3 Camp. 57; *Adams* v. *Wardley*, 1 M. & W. 374; *Besant* v. *Cross*, 10 C. B. 895; and *Bowerbank* v. *Monteiro*, 4 Taunt. 844.

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dorsee; as between them, the only contract which is implied is one of suretyship. Both drawer and indorser are but sureties. The position of the drawer with regard to the payee is the same as that of the indorser with reference to any subsequent indorsee. The general doctrine is thus laid down by Maule, J., in *Castrique* v. *Buttigieg* (1): "The liability of an indorser to his immediate indorsee arises out of a contract between them; and this contract in no case consists exclusively in the writing popularly called an indorsement, and which is indeed necessary to the existence of the contract in question; but that contract arises out of the written instrument itself, the delivery of the bill to the indorsee, and the intention with which that delivery was made and accepted, as evinced by the words, either written or spoken, of the parties, and the circumstances (such as the usage of the place, the course of dealing between the parties, and their relative situations) under which the delivery takes place: thus, a bill with an unqualified written indorsement may be delivered and received for the purpose of enabling the indorsee to receive the money for account of the indorser, or to enable the indorsee to raise money for his own use on the credit of the signature of the indorser, or with an express stipulation that the indorsee, though for value, is to claim against the drawer and acceptor only, and not against the indorser, who agrees to sell his claim against the prior parties, but stipulates not to warrant their solvency. In all these cases, the indorser is not liable to the indorsee; and they are all in conformity with the general law of contracts, which enables parties to them to limit and modify their liabilities as they think fit, provided they do not infringe any prohibitory law." There are many authorities to shew that the intention of the parties to a contract may be shewn by a contemporaneous agreement, whether oral or written, provided such contemporaneous agreement does not vary or contradict or operate in defeazance of the contract declared on, but merely suspends the commencement of the obligation; such as *Davis* v. *Jones* (2); *Pym* v. *Campbell* (3); *Wallis* v. *Littell.* (4) In *Thompson* v. *Clubley* (5), in an action by indorsee against acceptor,

(1) 10 Moo. P. C. 94, 108.
(2) 17 C. B. 625; 25 L. J. (C.P.) 91.
(3) 6 E. & B. 370; 25 L. J. (Q.B.) 277.
(4) 11 C. B. (N. S.) 369; 31 L. J. (C.P.) 100.
(5) 1 M. & W. 212.

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it was held competent to the latter to shew that at the time of the acceptance it was agreed that the bill when due should be taken up by the plaintiff,—on the ground that it was a collateral agreement that the plaintiff would not enforce the contract upon the bill. In *Lloyd* v. *Howard* (1) the jury found that the drawer wrote his name on the bill and handed it to one Milton that Milton might get it discounted, which was not done, and that the plaintiff received the bill from Milton when overdue, and without consideration; and it was held that this was no indorsement. In Byles on Bills, 9th ed. 147, it is said, upon the authority of *Pike* v. *Street* (2) and other cases, that, "if there be a written or *even a verbal* agreement between an indorser and his immediate indorsee that the indorsee shall not sue the indorser, but the acceptor only, it has been held that such an agreement is a good defence on the part of the indorser against his immediate indorsee suing in breach of the agreement." "Indeed, the contract between indorser and indorsee does not consist exclusively of the writing popularly called an indorsement, though that indorsement be a necessary part of it. The contract consists partly of the written indorsement, partly of the delivery of the bill to the indorsee, and may also consist partly of the mutual understanding and intention with which the delivery was made by the indorser and received by the indorsee. That intention may be collected from the words of the parties to the contract, either spoken or written," &c. In the 5th American edition of Byles on Bills, p. 175, some American authorities are cited to shew that such evidence as this may be given.

[WILLES, J. If the agreement is void, what becomes of the securities?]

Channell. The surety paying, he would be entitled to them. (3)

BOVILL, C.J. I am of opinion that the oral evidence of the agreement mentioned in the third plea was properly rejected, and that the rule must be discharged. The contract entered into by the defendant was a contract in writing by his signature to the bill as drawer, which imports a liability on the defendant to pay the amount on default of the acceptor and notice to the defendant of

(1) 15 Q. B. 995; 20 L. J. (Q.B.) 1.
(2) M. & M. 226.
(3) See *Pearl* v. *Deacon*, 24 Beav. 186; *Ewart* v. *Latta*, 4 Macq. 983.

(3) sc 3 Jur NS 879

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such default. That which the plea attempts to set up is, that the defendant, at the time he signed the bill as drawer, entered into a contract under which the payment was to be made at a diferent time and in a different manner from that which the bill imports,—an agreement, in short, which contradicts the written contract, and oral evidence of which is inadmissible, according to the authority of numerous decisions; amongst others, *Hoare* v. *Graham* (1) and *Free* v. *Hawkins* (2), which were confirmed by *Moseley* v. *Hanford* (3) and other cases, and adopted in the recent case in this Court of *Young* v. *Austen*. (4) Mr. James in his argument relied mainly upon two authorities, viz. a passage in the judgment of Maule, J., in the Privy Council, in *Castrique* v. *Buttigieg* (5), and the case of *Wallis* v. *Littell*. (6) The facts of *Castrique* v. *Buttigieg* (5) did not raise the precise point which arises here. Certain general principles are there laid down, in which I fully agree. The mere signature does not make a contract. To constitute a contract, there must be a delivery over of the instrument by the drawer or indorser for a good consideration: and as soon as these circumstances take place the contract is complete, and it becomes a contract in writing. The question there was, whether an agent who received money abroad for his principal here, remitting it to him by means of bills of exchange which he indorsed without reservation, was liable to his principal on such indorsements, on failure of the acceptors to pay the bills. Upon the facts and correspondence it was found that the agent put his name on the bills, not intending his signature to operate as an indorsement in the ordinary way, but merely for the purpose of their more convenient and safe transmission. In reality, the facts shewed no consideration. The case therefore is essentially different from the present, where the bill was drawn and delivered over to the payee with the intent that the drawing should be operative as the drawing of a bill. The ground of the decision in the other case relied on, *Wallis* v. *Littell* (6), was, that, upon the facts, the oral agreement set up was not a variation or defeazance of the written agreement declared on, but was merely offered to shew that the

(1) 3 Camp. 57.
(2) 8 Taunt. 92.
(3) 10 B. & C. 729.
(4) Law Rep. 4 C. P. 553.
(5) 10 Moo. P. C. 94, 108.
(6) 11 C. B. (N. S.) 369; 31 L. J. (C.P.) 100.

written agreement was not to take effect until the happening of a given event. But, in the course of the judgment, Erle, C.J., says that, if the oral agreement was a defeazance merely, it would have been in contradiction of the written agreement, and therefore would not have been admissible in evidence. The present case consequently stands unaffected by any adverse authority. The evidence offered would clearly vary the contract which appeared on the face of the bill, and was properly rejected. The rule must, I think, be discharged.

WILLES, J. I must confess I should have been better satisfied if the Court could have arrived at another conclusion in this case; for, I entertain great doubt as to the propriety of excluding the parol evidence. This does not fall within that class of cases where there has been a collateral agreement that the bill shall not be paid at maturity, or postponing the payment under circumstances which do not affect the original consideration. The bill was in fact drawn and delivered by the defendant for the debt of the acceptor and as his surety. It does not clearly appear on the face of the plea whether or not the plaintiff knew that the defendant drew the bill as a surety; but probably he did know it, as he took certain securities from the acceptor. The agreement alleged in the third plea is, that, if the bill should not be duly paid, the plaintiff would sell the securities and apply the proceeds in liquidation of the bill, and that, until the plaintiff should have so sold the securities, the defendant should not be sued upon the bill. That is not like the agreement set up in *Hoare* v. *Graham* (1), or in *Young* v. *Austen* (2), where the agreement was that the bill should be renewed: nor is it like the agreement in *Free* v. *Hawkins* (3), which was set up for the purpose of postponing the time for payment out of a fund within the control of the maker of the note, and not, as here, under the control of the plaintiff, and providing for a means of payment of the bill. So, *Foster* v. *Jolly* (4) was a case where it was attempted to set up an agreement that the payment of the bill was to be contingent on the happening of a certain event, and the case did not turn on the payment being out of a fund which was

(1) 3 Camp. 57.
(2) Law Rep. 4 C. P. 553.
(3) 8 Taunt. 92.
(4) 1 C. M. & R. 703.

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under the control of the plaintiff himself. These cases are all distinguishable, inasmuch as they were cases where the defendants were held not to be entitled to contradict by parol evidence a written contract which was as complete at the time it was entered into as it ever was intended to be, for, as Lord Ellenborough says, it would be contrary to first principles to incorporate with a written contract an incongruous parol condition. This, however, is a case in which I should have wished to uphold the agreement; not, perhaps, exactly as is put in the plea, viz. an agreement to provide a fund out of which the bill was in a certain event to be satisfied, but rather as a pre-arranged mode of payment of the bill out of the proceeds of the securities mentioned, with an agreement that until the plaintiff should have made those securities available it was not to be a bill enforceable against the defendant at all. I see nothing in that which is at all inconsistent with any principle of law. And I do not see why we should not make a precedent, to meet the circumstances and the merits of the particular case. The law as to bills of exchange constitutes an exception to that relating to ordinary contracts, with respect to the discharge by parol of the obligation created thereby; as is exemplified by the case of *Foster* v. *Dawber*. (1) I do not see why we should not, in a novel case to which no distinct law is applicable, rather follow the justice of the case than strive to bring the case within a principle which will defeat justice. For these reasons, I entertain great doubt, though I do not feel so strongly on the subject as absolutely to dissent from the judgment of the rest of the Court.

KEATING, J. I should have been desirous, like my Brother Willes, if we could consistently have done so, to decide in favour of the admissibility of this evidence, because it is excluded only by reason of a rigid rule of law laid down for the general benefit of suitors, but which nevertheless in some cases works hardship. As far, however, as I am aware, upon the authorities on the subject of bills of exchange, it has always been laid down as an inflexible rule that you cannot by parol evidence contradict the terms of the written contract, though you may negative the consideration, as between the immediate parties. The bill here was drawn by the

(1) 6 Ex. 839; 20 L. J. (Ex.) 385.

defendant upon Arthur Crux, payable to the plaintiff. The plea is, that, at the time the defendant drew and delivered the bill to the plaintiff, it was agreed between the plaintiff and defendant and Arthur Crux that Arthur Crux should deposit certain securities with the plaintiff, and that, in case the bill should not be duly paid, the plaintiff should sell the securities and apply the proceeds in liquidation of the bill, and that, until the plaintiff should have so sold the securities, the defendant should not be called upon to pay the bill. It seems to me that that does not touch the consideration, but sets up an agreement for the postponement of the defendant's liability contrary to the contract on the face of the bill. I am not aware of any case where it has been held that parol evidence is admissible for that object: and there are many cases to the contrary. In *Foster* v. *Jolly* (1), it was sought to give evidence to qualify the defendant's liability on a note by shewing an agreement that it was not to be paid if a verdict was obtained in an action then pending between other parties,—an agreement not very dissimilar to the present. But Parke, B., said (2): "The general rule is, that the maker is at liberty to contradict the value as between himself and the party to whom he gave the note; but he is not at liberty to contradict the express contract to pay at a specified time." That is precisely what this plea seeks to do. The defendant says he is not liable to pay at the expiration of the twelve months stipulated by the bill, but only upon the happening of an event which is altogether collateral to and independent of the contract created by the bill. None of the cases referred to in Byles on Bills warrant this contention. The only authority which looks at all like an exception is *Pike* v. *Street*. (3) But the observation of Parke, B., in *Foster* v. *Jolly* (1), shews that that in truth is not an exception at all. Under these circumstances, I feel reluctantly constrained to come to the conclusion that the evidence offered was not admissible, and that the rule must be discharged.

BRETT, J. I agree that the evidence was not admissible, because it did not impeach the consideration for the bill, or shew that it had failed, or set up any agreement to suspend the commencement of

(1) 1 C. M. & R. 703, 708. (2) 1 C. M. & R. at p. 708.
(3) M. & M. 226.

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the defendant's liability. It attempts to alter or limit the defendant's liability as it appears on the face of the bill, viz. to pay the bill at maturity in the event of the acceptor failing to do so. The plea in subtance is that the defendant agreed with the plaintiff that he should not be called upon to pay the bill until the plaintiff should have realized certain securities which the acceptor had deposited with him. The consideration for the defendant's becoming the drawer of the bill probably was that the plaintiff should forbear to sue Arthur Crux for a debt then due, or should discount the bill for Arthur Crux. The fact of security being given, or of the plaintiff's failure to realize the security, does not alter or impeach the consideration. The parol agreement does not postpone the liability of the defendant as drawer of the bill, but limits his liability as defined by the bill. There are many authorities to shew that an acceptor cannot do this; and, though there is no express decision upon the point, I am not aware that there is any distinction between the case of an acceptor and that of a drawer or an indorser. The contract of the drawer is as much a contract on the face of the bill as that of the acceptor. I agree that *Young* v. *Austen* (1) is not an authority on the subject. It did not decide whether the agreement to vary the terms of the bill must be in writing or not; but only that, if the law required it to be in writing, it must be assumed on the pleadings there that it was in writing. The present case raises the precise question; and I agree with my Lord and my Brother Keating that the agreement must be in writing.

Rule discharged.

Attorneys for plaintiff: *G. & J. Allen & Son.*
Attorney for defendant: *Lewis Hand.*

(1) Law Rep. 4 C. P. 553.

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Nov. 5.

Bill of Exchange—Forged Acceptance—Estoppel by Payment of a former Forged Bill.

In August, 1867, the defendant paid a bill of exchange (of which the plaintiff was the holder) upon which the defendant's name had been written as acceptor without his authority. In an action against him upon another bill similarly accepted, the jury found that the acceptance was not the defendant's signature nor written with his authority, that the forged signature was not adopted by the defendant, that the defendant did not know that the plaintiff was the holder of the former bill, and that he did not lead the plaintiff to believe that the acceptance on the bill sued upon was his:—

Held, that the fact of the defendant having paid the bill in August, 1867, did not estop him from denying that the bill declared on was accepted by him or with his authority, and that the judge was not bound to tell the jury that, as matter of law, the plaintiff was entitled to a verdict.

ACTION by the plaintiff against the defendant, as the acceptor of a bill of exchange for 400*l.*, dated the 22nd of July, 1868, drawn by Richard Bethell, payable three months after date, and indorsed by Richard Bethell to the plaintiff.

Plea: Denial of the alleged acceptance. Issue thereon.

The cause was tried before Bovill, C.J., at the sittings at Westminster, after last Trinity Term. The facts were as follows:—In May, 1867, the plaintiff discounted for Richard Bethell a bill for 300*l.*, purporting to be drawn by Richard Bethell upon the defendant and to be accepted by the latter, payable at his bankers, Coutts & Co., which bill was at its maturity, viz. on the 5th of August, 1867, paid by Messrs. Coutts & Co., by authority of the defendant. Upon the faith of the former bill having been duly honoured by the defendant, the plaintiff also discounted for Richard Bethell the bill declared on. The defendant had in June and July, 1867, before maturity, paid other two bills similarly drawn, and which purported to be accepted by him. The defendant, who was called as a witness, swore that all these acceptances were forgeries, that the acceptances were unauthorized by him, and that he did not know that the plaintiff was the holder of the bill for 300*l.* which was paid in August, 1867. He further stated that he had paid the former bills in order to avert from his brother the conse-

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quences of his act, and upon his solemn promise that it should not be repeated. It did not appear that the plaintiff was aware of the payment of the two bills in June and July, 1867, or that he made any inquiry before he took the bill in question.

On the part of the plaintiff it was contended that the defendant, having paid the bill which the plaintiff held in August, 1867, admitted thereby that the acceptance was genuine, and, in the absence of notice to the plaintiff, was estopped from denying that the bill declared on was accepted by him or with his authority.

The Lord Chief Justice, though pressed by the Solicitor-General, on behalf of the defendant, to do so, refused to nonsuit the plaintiff; and the jury, in answer to questions left to them, found that the acceptance to the bill declared on was not the defendant's signature, nor authorized nor adopted by him; that he did not know that the plaintiff had held the former bill of August, 1867; and that he did not lead the plaintiff to believe that the acceptance to the bill in question was his signature, or was authorized by him.

A verdict was thereupon entered for the defendant; leave being reserved to the plaintiff to move to enter a verdict for him for the amount of the bill and interest, if the Court should be of opinion that the Lord Chief Justice was bound to hold, as matter of law, that the plaintiff was under the above circumstances entitled to a verdict.

Nov. 5. *Huddleston, Q.C.* (*Holl* with him), moved accordingly. By paying the bill which became due in August, 1867, the defendant in effect represented to the plaintiff that the acceptance which he so honoured was his acceptance; and, until he gave notice to the contrary, he thereby estopped himself from denying the authenticity of subsequent acceptances of a like description. That was in substance decided in *Barber* v. *Gingell.* (1) There, in order to meet a defence of forgery, the plaintiff proved that the defendant had paid several other bills drawn and accepted by the person who was alleged to have forged the defendant's acceptance to the bill in question; and Lord Kenyon ruled that, though the

(1) 3 Esp. 60.

defendant might not have accepted the bill declared on, he had adopted the acceptance, and made himself thereby liable to the payment of it. The same principle is affirmed by Bayley, J., in *Heane* v. *Rogers*. (1) "There is no doubt," he says, "but that the express admissions of a party to a suit, or admissions implied from his conduct, are evidence, and strong evidence, against him; but we think that he is at liberty to prove that such admissions were mistaken, or were untrue, and is not estopped or concluded by them, unless another person has been induced by them to alter his condition; in such a case the party *is* estopped from disputing their truth with respect to that person (and those claiming under him) and that transaction; but as to third persons he is not bound." Wherever a man has so conducted himself as to induce another to infer the existence of a given state of things, and to act upon that inference, he is estopped from afterwards denying it. This is the rule which is to be deduced from a long series of decisions, and amongst them *Graves* v. *Key* (2), *Pickard* v. *Sears* (3), *Gregg* v. *Wells* (4), *Freeman* v. *Cooke* (5), *Ryan* v. *Sams* (6), and *Cornish* v. *Abington*. (7)

Whether he knew it or not is immaterial. The question is whether he has not so conducted himself as to mislead any person who might happen to become the holder of a similar bill.

The following cases were also referred to: *Dickinson* v. *Valpy* (8); *Fox* v. *Clifton* (9); *Collingwood* v. *Berkeley* (10); *Maddick* v. *Marshall* (11); *Young* v. *Grote* (12); *Coles* v. *Bank of England*. (13)

BOVILL, C.J. At the trial the plaintiff's counsel contended that the defendant was estopped from denying that the acceptance to the bill declared on was his. The Solicitor-General, on the other hand, insisted that I ought to nonsuit the plaintiff. I declined to withdraw the case from the jury, because I thought there was evi-

(1) 9 B. & C. 577, 586.
(2) 3 B. & Ad. 313.
(3) 6 Ad. & E. 469.
(4) 10 Ad. & E. 90.
(5) 2 Ex. 654.
(6) 12 Q. B. 460.
(7) 4 H. & N. 549; 28 L. J. (Ex.) 262.
(8) 10 B. & C. 158.
(9) 9 Bing. 115.
(10) 15 C. B. (N. S.) 145.
(11) 16 C. B. (N. S.) 387; in error 17 C. B. (N. S.) 829.
(12) 4 Bing. 253.
(13) 10 Ad. & E. 437.

(11) S C 10 Jur NS 770, 842. 201

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dence for them, though extremely slight. I now entertain some doubt whether I ought to have left the case to the jury at all. They however found that the acceptance in question was not the defendant's signature, nor affixed to the bill with his authority, and that the false signature was not adopted by the defendant; and they further found that the defendant did not know that the plaintiff was the holder of the 300*l.* bill paid in August, 1867. With reference to the alleged holding out, the jury also found that the defendant did not lead the plaintiff to believe that the acceptance was his signature. If, then, the question was for the jury, it has been decided against the plaintiff. Mr. Huddleston now insists that I was bound to rule, as matter of law, that upon the facts proved the plaintiff was entitled to the verdict: and that is the question which by consent was reserved by me for the Court. I am of opinion that the finding of the jury disposes of the case. The only ground upon which a man can be held responsible as the acceptor of a bill signed by another in his name, is, that he has authorized or adopted the signature, or has so conducted himself as to be estopped from disputing it. Now, what had the defendant done here? He had on a former occasion paid a bill of which the plaintiff was the holder, which had been similarly accepted in his name without his authority: and it is contended that he thereby held out to the plaintiff that he would treat as genuine and pay all bills so accepted. There was no evidence that the defendant ever knew that the plaintiff was the holder of the former bill: and the plaintiff seems to have made no inquiry when he discounted the bill in question. If it were made to appear that there has been a regular course of mercantile business, in which bills have been accepted by a clerk or agent whose signature has been acted upon as the signature of his principal, there would be evidence, and almost conclusive evidence, against the latter that the acceptance was written by his authority. That was the case of *Barber* v. *Gingell.* (1) It would have been idle to contend there that the defendant was not responsible for the signature. The report is short; but I do not understand it to have been treated as matter of law, but rather as a conclusion of fact by the jury. Here, the transaction was not one of a mercantile character; there was no course of business

(1) 3 Esp. 60.

between the parties. What, then, does the payment of one bill under such circumstances hold out? Is it that, as a matter of law, the party binds himself to pay all future bills which may assume to bear his acceptance, whether authorized by him or not? I should be sorry to affirm any such principle: and I think no jury could safely act upon the notion of authority or adoption under such circumstances. The utmost extent of the doctrine, as it seems to me, is, that it is a question for a jury. Indeed, in all the cases cited by Mr. Huddleston the question was left to the jury. If the defendant had by his conduct led the plaintiff to suppose that the acceptance was his genuine signature, or was authorized by him, he might be estopped from disputing it: otherwise not. But that was especially a question for the jury. It was put to the jury, and they negatived it, and, as I think, properly negatived it. At all events, there was no evidence upon which the judge would have been warranted in acting upon his own responsibility and holding that, as matter of law, the plaintiff was entitled to a verdict. The rule must, therefore, be refused.

WILLES, J. I am of the same opinion. The utmost extent to which we could go in Mr. Huddleston's favour would be to affirm that of which he had the full benefit at the trial. The matter was left to the jury; and they have decided against the plaintiff. One who pays one bill which purports to bear his signature as acceptor, thereby makes evidence against himself that the person who wrote the acceptance did so with his authority; and, if the bill is given in a course of business implying a continuance of such authority, it may be conclusive evidence. That is the fullest extent to which it is possible, consistently with law, to affirm the proposition: and that is disposed of by the findings of the jury in this case. What we are now asked to say is, that, although authority to accept and any adoption or ratification of the acceptance be negatived, and although there has been no course of business, and nothing to shew any continuance of authority, or representation of continued authority, to accept bills in his name, the payment by the defendant of one bill which purports to bear his acceptance affords not merely evidence, but a presumptio juris et de jure which cannot be contradicted, that all subsequent bills bearing the same sort of acceptance

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are authorized by him. That proposition is neither sanctioned by law nor is it in accordance with common sense. In the absence of proof of any authority or adoption or course of business, the payment of the bill in August, 1867, was only evidence of an admission by the defendant that that bill was accepted by him or by some one acting under or authorized by him; not of a general authority in that person to accept bills in his name. The doctrine of estoppel has no application to such a case. It is unnecessary to say anything as to the payment of the other bills to which the plaintiff was no party. That was left to the jury. I entirely agree with my Lord that there should be no rule.

KEATING, J. I am of the same opinion. No doubt, a man who pays one or more forged acceptances does furnish some evidence against himself that the acceptance was authorized by him; and it might perhaps be said that the payment by the defendant to the plaintiff of the bill which became due in August, 1867, was evidence to go to the jury that he authorized that particular acceptance. I therefore think my Lord was right in leaving the matter to the jury. That, however, does not suit the plaintiff's purpose, because the whole of the facts were left to the jury, and they have found against him. He now seeks to contend that, as matter of law, having paid one forged acceptance in the hands of the plaintiff, the defendant binds himself for ever unless he gives notice, and cannot be heard to say that he did not authorize the acceptance of a subsequent bill. I know of no authority which at all approaches an affirmance of that proposition: and I agree with my Brother Willes that it is equally opposed to law and to common sense.

BRETT, J. The acceptance in question was not the signature of the defendant, nor was it authorized by him, nor was any representation made by him with regard to this particular bill. But it has been contended that by paying the former bill he did impliedly represent that the acceptance of this bill was authorized by him, and that, the plaintiff having acted upon the faith of that implied representation, the defendant is estopped from denying it. I must confess I have great doubts whether there was any evidence at all

to go to the jury. But, if there was, the jury have disposed of it, and properly I think. The argument in effect amounts to this, that, if a man by payment once authenticates a forged acceptance, he is bound for ever, unless he gives notice. There is no foundation whatever for such a proposition.

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Rule refused.

Attorney for plaintiff: *E. G. Lawrence.*

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Nov. 11.

Bankrupt Act, 1849 (12 & 13 *Vict. c.* 106), *s.* 112—*Bankruptcy Act*, 1861 (24 & 25 *Vict. c.* 134), *s.* 198—*Certificate of Registration of Deed under s.* 192—*Arrest—Discharge of Debtor—Sheriff—Trespass.*

The sheriff is not liable in trespass for arresting or detaining a debtor who has executed a deed of assignment under s. 192 of the Bankruptcy Act, 1861, after production of a certificate of registration; the debtor's remedy being by application to the Court or a judge for his discharge from custody, or possibly by a proceeding against the bailiff under s. 112 of the Bankrupt Act, 1849.

Ames v. *Colnaghi* (Law Rep. 3 C. P. 359) explained.

DECLARATION, that the defendants assaulted the plaintiff and took him into custody, and caused him to be imprisoned for the space of eight days, until he was discharged by due course of law, &c.

The defendants in their second plea justified the taking and detaining the plaintiff, as sheriffs and bailiff, under an execution at the suit of one B. Colnaghi.

New-assignment, that, before the bailiff took the plaintiff and kept him in the custody of the sheriffs as in the second plea was alleged, the plaintiff had made and executed such deeds and documents and had taken such steps and proceedings that, under and by virtue and in pursuance thereof and of the Bankruptcy Act, 1861, one J. F. Miller, Esq., then being the chief registrar of the Court of Bankruptcy, did duly certify that on the 12th of October, 1865, a certain deed or instrument bearing date the 18th of September, 1865, and made and executed by and between the plaintiff of the first part, R. C. Macrae, a trustee for the creditors of the plaintiff, of the second part, and the several persons, companies, and firms, &c., in a schedule thereto, who had in writing assented

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thereto, being a majority in number representing three-fourths in value of all the creditors of the plaintiff, of the third part, and all other the creditors of the plaintiff of the fourth part,—the same being a deed or instrument of conveyance of all the estate and effects of the plaintiff to the said trustee, in trust for all the creditors of the plaintiff,—was, on &c., brought into the office of the said chief registrar for registration, and was duly filed and registered pursuant to the provisions of the Bankruptcy Act, 1861: that such last-mentioned certificate was given as well under the hand of the said chief registrar as also under the seal of the Court of Bankruptcy on the 17th of October, 1865, and was afterwards duly issued and delivered by the chief registrar to the plaintiff; of all which the defendants had due notice: that the plaintiff brought his action, not for the trespasses in the second plea admitted and attempted to be justified, but for that the defendants committed the trespasses in the declaration alleged, after the alleged taking and keeping the plaintiff in custody as in the second plea was admitted (1), and after the plaintiff had duly produced and shewn such certificate to the defendants, and after all conditions had been performed, and all things had happened and been done, and all reasonable and other times had elapsed, necessary to entitle the plaintiff as well to have the full benefit and protection of the said certificate and to be discharged from the said alleged taking and keeping in custody in the second plea mentioned, as also to maintain this action for the trespasses in the declaration alleged.

Second plea to the new-assignment, that the plaintiff did not make or enter into any deed or instrument within the meaning of the Bankruptcy Act, 1861, as alleged, nor were any or either of the conditions necessary in that behalf observed or fulfilled, and by reason thereof the said certificate of the chief registrar was invalid and of no force.

Demurrer to the new-assignment to the second plea. Joinder.

Demurrer to the second plea to the new-assignment. Joinder.

Robinson, Serjt. (*Tapping* with him), for the plaintiff. The new-

(1) "By keeping and detaining the plaintiff in custody under the process. in that plea mentioned,"—agreed to be inserted by way of amendment.

assignment in this case raises the very question which was decided by this Court in *Ames* v. *Colnaghi*. (1) In *Lloyd* v. *Harrison* (2), it was held by the Exchequer Chamber, affirming the judgment of the Court of Queen's Bench (3), that the production of a certificate, valid on its face, of the registration of a deed of assignment under s. 192 of the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), by a debtor for the benefit of his creditors, justifies the sheriff, under s. 198, in releasing the debtor whom he has arrested on a ca. sa. at the suit of a creditor, although the deed be in fact invalid as between the debtor and non-assenting creditors; Erle, C.J., saying (3): "By the 198th section, *the certificate* of such deed is to operate as a protection in bankruptcy, so that the sheriff is not to go and ascertain whether the certificate is true and there is a valid deed, but is to act at once upon the production of the certificate. The words of the section give some operation to the certificate; and the certificate would be without any operation if the production of it were not sufficient. Some stress was laid on the fact that it is only the certificate of *such* deed which is to operate as a protection, that is, a certificate of a valid deed; but this on the face of it is a certificate of a valid deed, and so is a certificate of 'such deed.' The protection given to the debtor is not a mere privilege,"—as in *Magnay* v. *Burt* (4),—"but a right to be at once discharged, as in the case of a protection in bankruptcy; and, whether or not the sheriff would be liable to the penalty of 5*l.* for every day he detained the debtor in his custody, it is not necessary to inquire; at all events, he is justified in discharging the debtor." In *Ames* v. *Colnaghi* (1) this Court went a step further, and held that the sheriff, under such circumstances, *must* discharge the party, even though he has notice that the deed is invalid,—Montague Smith, J., in particular, assuming this to be the legitimate result of the decision in *Lloyd* v. *Harrison*. (2) If the sheriff, being bound to discharge the debtor, in violation of his duty detains him in custody, he is clearly liable to an action.

[WILLES, J. This action will not lie, unless the plaintiff can take advantage of his own wrong; which is contrary to all legal principle.]

(1) Law Rep. 3 C. P. 359.
(2) Law Rep. 1 Q. B. 502.
(3) Law Rep. 1 Q. B. at pp. 509, 510.
(4) 5 Q. B. 381.

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No question arises as to the validity of the deed. The words of s. 198 are express: after notice of the filing and registration of such deed has been given as aforesaid (s. 193), no execution against the debtor's property in respect of any debt, and no process against his person in respect of any debt, shall be available to any creditor or claimant without leave of the Court; and a certificate of the filing and registration of such deed under the hand of the chief registrar and the seal of the Court shall be available for all purposes as a protection in bankruptcy. Byles, J., in *Ames* v. *Colnaghi*, says (1): "After the best consideration that I have been able to bestow on the subject, it seems to me that we give due effect to the words 'such deed' in the 198th section, by saying that it means such a deed as the Court of Bankruptcy (which has jurisdiction over the matter) has by filing and registration pronounced to be primâ facie a good deed. The certificate to that effect is to be available, not for all times or all purposes, but for the ad interim protection of the debtor from process against his person, till the protection shall be revoked, or the deed declared void, by a Court of competent jurisdiction."

[BRETT, J. It was not necessary for this Court to decide in that case that the sheriff must at the peril of an action discharge the debtor; the only question before them was whether or not he was entitled to be discharged.]

Unless the sheriff was *bound* to discharge the plaintiff, he could not have had judgment in that case. In *Tarlton* v. *Fisher* (2), it was held that a sheriff or his officer is not liable to an action for false imprisonment for arresting a certificated bankrupt, a peer, a discharged insolvent, or a person who took advantage of the 20 Geo. 3, c. 64, made on the occasion of the prisons in London being burnt by the rioters, although the party in such cases is privileged from arrest. But the ground of the decision there was that the sheriff had a discretion. "The sheriff," said Lord Mansfield (3), "is not bound not to arrest. If he chooses to take the truth of the facts upon him, and not arrest the party, he may, and the surrender and compliance with the Act will be a good return: but he will be answerable." That principle pervades all the Bank-

(1) Law Rep. 3 C. P. 365. (2) 2 Doug. 671.

(3) 2 Doug. at p. 673.

rupt Acts down to the Act of 1861. In *Magnay* v. *Burt* (1), Tindal, C.J., delivering the judgment of the Court of error, says: "The extreme difficulty cast on the sheriff, of determining whether the privilege set up by the party is founded in truth, is another ground for holding the action not to lie. He cannot, as was observed by the Court in *Tarlton* v. *Fisher* (2), administer an oath; and he must refuse to execute the process of the Court at his peril. And it may be added that, though the sheriff may know the party has the privilege, it is impossible for him to be certain that he means to claim it; and, unless he does claim it, he is in lawful custody, and the judgment satisfied." Since the Bankruptcy Act, 1861, and the decision of this Court in *Ames* v. *Colnaghi* (3), that reason no longer exists.

[WILLES, J., referred to *Godwin* v. *Stone* (4), where the sheriff was held liable for not arresting a debtor who had before the commencement of the action against him executed a deed of arrangement, and obtained a certificate of registration, but had omitted to avail himself of the opportunity of pleading it, by suffering judgment by default.]

Where the protection is absolute, and good upon the face of it, and the sheriff has no discretion, there is no reason why he should not be liable. (5) In *Lees* v. *Neuton* (6), an action was held to lie against the officer (the bailiff) for an undue detention of the plaintiff on an arrest under a ca. sa., after having been shewn his protection in bankruptcy, for the penalty imposed by s. 113 of the Bankrupt Act of 1849, 12 & 13 Vict. c. 106. In *Moone* v. *Rose* (7), an action was held to lie against the gaoler for not discharging from custody a party in contempt for not answering to a bill in Chancery, who had not been brought to the bar of the Court within the thirty days prescribed by s. 15, sub-s. 5, of the 11 Geo. 4 & 1 Wm. 4, c. 36. "The statute," said Lush, J. (8), "makes it the imperative duty of the person in whose custody the party guilty of contempt is, to discharge him unless he be called to the bar of the Court within the specified time. Whether he has been called to

(1) 5 Q. B. 381, 393.
(2) 2 Doug. 671.
(3) Law Rep. 3 C. P. 359.
(4) Law Rep. 4 Ex. 331.
(5) See *Yearsley* v. *Heane*, 14 M. & W. 322.
(6) Law Rep. 1 C. P. 658.
(7) Law Rep. 4 Q. B. 486.
(8) Law Rep. 4 Q. B. at p. 492.

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the bar or not must be known to the person in whose custody the prisoner is, because he is to be brought up by writ of habeas corpus, which would be directed to the gaoler. . . . The gaoler, therefore, having the plaintiff in custody, it was his duty to discharge her, and, not having done so, he is liable to an action." So, here, it being the sheriff's duty to discharge the party on production of the certificate; he is clearly liable to an action for the breach of that duty.

Quain, Q.C. (*Day* with him), for the defendants, was not called upon.

BOVILL, C.J. This seems to me to be a case of the first impression. The argument on the part of the plaintiff has proceeded upon the supposition that the Court had conclusively decided in *Ames* v. *Colnaghi* (1) that the sheriff was bound of his own authority to discharge the debtor on the production of a certificate, under the hand of the chief registrar and the seal of the Court, of the filing and registration of a deed under s. 192 of the Bankruptcy Act, 1861, and that, if he refuses to discharge him from custody on his producing such certificate, he is liable to an action of trespass. The argument, however, is founded on a misconception of what the Court really decided in that case. The question presented for decision was whether under the circumstances the debtor was entitled to be discharged; and that question the Court answered in the affirmative. The mode of discharge, which is directly raised on the present occasion, did not come in question there. It was urged that the sheriff is bound at once to discharge the party on production of the certificate, without taking time for inquiry or an order of the Court. Whether that be so or not must depend upon the construction of s. 198, which enacts that, "after notice of the filing and registration of such deed has been given as aforesaid (s. 193), no execution against the debtor's property in respect of any debt, and no process against his person in respect of any debt, shall be available to any creditor or claimant without leave of the Court; and a certificate of the filing and registration of such deed under the hand of the chief registrar and the seal of the Court, shall be available to the debtor for all purposes as a protection in bankruptcy." After the granting of the certificate, therefore, the

(1) Law Rep. 3 C. P. 359.

writ remains, but its action is suspended until the leave of the Court is obtained for putting it in force. The certificate is to be available to the debtor for all purposes as a protection in bankruptcy. How was a protection in bankruptcy made available? No instance has been found of an action having been maintained against the sheriff for not discharging a bankrupt under such circumstances; but there are abundant dicta in the books that no such action is maintainable. It is impossible to put it better than it is put by Buller, J., in *Tarlton* v. *Fisher* (1), decided in 1781: "As to the discharge, express words would have been used, if it had been meant to vest new powers in the sheriff. The meaning must have been, to vest the power of discharge where, in other cases, it was vested before, viz. in the Court out of which the process issued, or, in vacation, in one of the judges. That satisfies the words of the Act. In cases of bankrupts or insolvents, what is done? Hundreds have been arrested, but there never was an instance of an action against the sheriff or his officers in such cases. The practice in case of bankrupts is, to apply to a judge, and verify the certificate by affidavit. (2) How could the sheriff ascertain that the certificate was signed by the commissioners? He cannot administer an oath. In the case of insolvent debtors, the provisions for this discharge are somewhat different in words, but are in substance, I think, the same." And again (3), "The general law as to sheriffs is, that, if a sheriff has acted in obedience to the mandate of the Court, he is excused. If he arrest a peer, the writ is erroneous, yet he is not a trespasser for executing it. In trespass, the defendant must shew an excuse. Have the defendants done so in this case? Yes; for, the mandate of the Court was compulsory on them. The original plaintiff would not be liable to an action of trespass till the writ is superseded; for, till then it is a justification. After a supersedeas, trespass will lie against the party; but still not against the sheriff. I take this to have been settled over and over again: and the inconvenience would be great if the law were otherwise." In that case the plaintiff's right to maintain trespass turned upon the construction of s. 2 of the 20 Geo. 3, c. 64, which provided that persons who had obtained a

(1) 2 Doug. 671, 676.

(2) 5 Geo. 2, c. 30, s. 13.

(3) 2 Doug. at p. 677.

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certificate as therein mentioned should not be liable to be arrested by virtue of any civil process out of any court, and, in case they had been or should be so arrested, should be discharged therefrom: and the Court held that the sheriff was not liable in trespass for executing the process, but the remedy for the party was an application to the Court or a judge for his discharge from custody. So, in Watson's Sheriff, 2nd ed. 141, it is laid down that "the sheriff, notwithstanding the defendant claims privilege from arrest by his bankruptcy and certificate, or under a discharge as an insolvent debtor, should not discharge him without an indemnity, or by order of the Court; for, otherwise, he might be driven to litigate with the plaintiff the question of the defendant's privilege." In truth, the whole series of provisions in the several bankrupt acts are framed on the notion that no such action will lie. In several of them, special provisions are made for the case of a person having protection being arrested or detained; as, for instance, in s. 113 of the Act of 1849, which imposes a penalty of 5*l.* for every day he shall be kept in custody after the production of his protection, not upon the sheriff, but upon the officer to whom the certificate is produced. By holding, therefore, that there must be an order for the discharge before any right of action against the sheriff can accrue, we give full effect to the certificate "for all purposes as a protection in bankruptcy." On that view, the new-assignment is bad; and the plea, which negatives the performance of the conditions necessary to entitle the plaintiff to be discharged as alleged, is a good answer to it. The notice referred to in s. 198 is the notice to be published in the Gazette, not notice to the sheriff or his officer. And, if the new-assignment alleges notice, the plea denies it. I am therefore of opinion that the defendants are entitled to judgment. If any further authority were wanting to shew that trespass is not maintainable, I would refer to *Phillips* v. *Naylor*. (1) There, the plaintiff was detained in custody, notwithstanding he had a protection in bankruptcy, of which one of the defendants had notice, and yet the action was held not to lie.

WILLES, J. I am of the same opinion. If it were necessary to deal with the plea to the new-assignment, I own I should be

(1) 3 H. & N. 14.

surprised if a person who has obtained a certificate which he ought not to have obtained, should (notwithstanding he might be entitled under the Act to be discharged from custody) be held entitled to a remuneration in damages for his detention. I think, however, the new-assignment discloses no cause of action. What appears upon the face of it is this,—that the plaintiff, against whom a judgment had been obtained, took proceedings under the arrangement clauses of the Bankruptcy Act, 1861, and procured from the proper officer a certificate that he had executed a deed complying with the provisions of the Act, and that such deed was duly filed and registered. I pass over the question whether the new-assignment shews notice in the Gazette under s. 193. I incline to think it does not. But, assume that it does, the new-assignment goes on to allege that, after notice to the sheriff (not the notice referred to in s. 198), he continued to detain the plaintiff in custody under a writ of exigi facias founded upon the judgment. It is in respect of that detention that the plaintiff brings this action; and the question is, whether the plaintiff can maintain trespass against the sheriff, or whether under such circumstances he is not limited to the special remedy against the officer for detaining him, or to an application to the Court or a judge for his discharge from custody. The solution of that question must turn upon the construction to be put on s. 198 of the Bankruptcy Act, 1861, which provides that, " after notice of the filing and registration of such deed has been given as aforesaid,"—which I take to mean the notice in the Gazette required by s. 193,—" no execution against the debtor's property in respect of any debt, and no process against his person in respect of any debt, shall be available to any creditor or claimant without leave of the Court." Then the clause goes on, " and a certificate of the filing and registration of such deed under the hand of the chief registrar and the seal of the Court shall be available to the debtor for all purposes as a protection in bankruptcy." Our decision would affect the case of an execution against goods as well as an execution against the body. It is material to bear that in mind in order to see whether my Brother Robinson is right in saying that his construction of the Act entails no hardship on the sheriff, because the action can only be maintained after notice given by the production of the certifi-

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cate. Comparing s. 198 with ss. 112 and 113 of the Act of 1849, I think that, if this action is maintainable at all, it is an action founded on the earlier part of the clause, which declares that the process shall not be available to any creditor or claimant. The case of goods, where there is a bankruptcy, is provided for sufficiently by the goods being vested in the assignees, and by the clauses protecting executions completed before the bankruptcy or notice in certain cases. Where those provisions do not apply, the sheriff is responsible to the assignees; but not until after a reasonable time for inquiry, and protection, in the event of an adverse claim, under the Interpleader Act. Therefore it was not thought necessary, in s. 112 of the Act of 1849, that the bankrupt should be protected from arrest. The legislature, in s. 113 go on to deal with the case of an arrest of the body, in these terms: "If any bankrupt shall be arrested in coming to surrender, or shall after his surrender and while protected by order of the Court be so arrested, he shall, on producing such protection to the officer who shall arrest him, and giving such officer a copy thereof, be immediately discharged; and, if the officer detains him after he shall have shewn his protection, except for so long as shall be necessary for obtaining a copy of the same, such officer shall forfeit to the bankrupt 5*l.* for every day he shall detain him." The provision at the end of s. 198 of the Act of 1861, that the certificate "shall be available to the debtor for all purposes as a protection in bankruptcy," was not intended to provide a machinery for carrying out the previous part of the section. The only notice provided for is the notice which is to be published in the Gazette pursuant to s. 193. After that, the process is not to be available. If, therefore, we held that the sheriff is liable to an action, we must hold him to be so from the time of publication in the Gazette, which I am not aware it has ever been decided that the sheriff is bound to read. This would be gross injustice. And it does not stand upon reasoning alone; for, in *Smith* v. *Egginton* (1), which was cited in *Moone* v. *Rose* (2), it was held by the Court of Queen's Bench that the sheriff was not liable to an action of trespass, and for the reason I have mentioned, because of the injustice of making the sheriff liable in trespass for not discharging the party without

(1) 7 Ad. & E. 167. (2) Law Rep. 4 Q. B. 486.

notice that the custody was at an end. And that is further illustrated by the case of *Moone* v. *Rose* (1) itself, where an action was held to lie against a gaoler for not discharging from custody a party in contempt for not answering to a bill in Chancery, who had not been brought to the bar of the Court within the thirty days prescribed by s. 15, sub-s. 5, of the 11 Geo. 4 & 1 Wm. 4, c. 36,—it being necessarily within the gaoler's knowledge whether the party had been brought up or not. Moreover, in *Tarlton* v. *Fisher* (2), where a person privileged from arrest by virtue of the statute 20 Geo. 3, c. 64, was taken on a ca. sa., the construction put upon the words "shall not be liable to be arrested," was, not that the sheriff was liable to an action, but that the party was entitled to his discharge. There has been considerable confusion about this matter, in consequence of the doctrine of *Tarlton* v. *Fisher* (2) not having been consistently adhered to. I find no case which gives any colour to the maintenance of an action against the sheriff under circumstances such as those in this case. With regard to *Magnay* v. *Burt* (3), it certainly does seem an extraordinary thing that a man who is privileged from arrest, being nevertheless arrested, should not be able to bring an action for the wrongful arrest. But this apparent anomaly vanishes when we come to consider the history of our law. Turning to Rastell's Entries, p. 472, b., we find that the remedy provided was to sue out a writ of privilege. The law having provided that specific remedy, though in modern times a motion in court was substituted for the writ, it is not for the Court to create another remedy, viz. by action. This case seems to me to stand on precisely the same ground: and I think there is good reason for it, for otherwise there would be no end of actions against officers to whom is intrusted the execution of process. I think the defendants in this case are entitled to judgment.

KEATING, J. I am entirely of the same opinion. The new-assignment is clearly bad. And indeed the plaintiff's counsel only proposed to support it upon the authority of *Lloyd* v. *Harrison* (4), followed by the case in this Court of *Ames* v. *Colnaghi*. (5) He

(1) Law Rep. 4 Q. B. 486. (2) 2 Doug. 671. (3) 5 Q. B. 381.
(4) Law Rep. 1 Q. B. 502. (5) Law Rep. 3 C. P. 359.

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contended that, because the Exchequer Chamber decided in the former case that the sheriff was *justified* in discharging the debtor upon his producing a certificate, and this Court in the latter case decided that, upon the production of the certificate, the party was *entitled* to his discharge, it followed that, if the sheriff failed to discharge him immediately, he must be liable in trespass. The learned counsel, however, altogether misconceived the intention of this Court in *Ames* v. *Colnaghi*. (1) The question submitted in that case was, whether or not the plaintiff was entitled to be discharged: and all the Court decided was, that he was so entitled. There are, no doubt, expressions to be found in the course of the judgment to the effect that the sheriff was bound to discharge him. But they are not to be construed as meaning that he must at the peril of an action discharge him. The Court would order his discharge; and possibly the officer would be liable to the penalty imposed by s. 113 of the Act of 1849. There being, therefore, no authority to support it, the new-assignment fails, and the defendants must have judgment.

BRETT, J. There might perhaps be some doubt upon the plea. But I entirely agree with the rest of the Court, that, assuming all the facts alleged in the new-assignment to be true, it does not disclose any actionable wrong on the part of the sheriff. The plaintiff complains of the infringement of a privilege. For this the Bankrupt Act points out a specific remedy, not the remedy here sought. Relying upon the reasons given by my Brother Willes, I will merely add that I think our present judgment is justified by that of Blackburn, J., in *Rossi* v. *Bailey*. (2) The learned counsel for the plaintiff admitted that his argument obtained no support from the older cases, and he placed his main reliance on *Ames* v. *Colnaghi*. (1) I think it has been fully explained that the Court did not mean there to decide any more than that the plaintiff was entitled to be discharged, not as to the means by which that right was to be carried into effect.

Judgment for the defendants.

Attorney for plaintiff: *W. S. Masterman.*
Attorneys for defendants: *Burchells & Hall.*

(1) Law Rep. 3 C. P. 359. (2) Law Rep. 3 Q. B. 621.

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Nov. 22.

Guarantee, Construction of—Consideration.

In April, 1867, in order to induce the plaintiff to continue his dealings with one F., who was then largely indebted to him, the defendant gave the plaintiff a guarantee as follows:—"In the event of your supplying Mr. D. F. any coals during the next twelve months from the 1st of April last past, I do hereby guarantee the payment to you of the amount for the time being due from Mr. D. F. for coals sold by you to him."

Before the expiration of the twelve months mentioned in the above guarantee, viz. on the 23rd of July, 1867, the debt due from F. to the plaintiff having greatly increased, and the plaintiff pressing for a settlement, the defendant gave him a further guarantee, as follows:—"Whereas Mr. D. F. is and stands indebted to you in the sum of 2205*l.* 3*s.* 9*d.* upon an account this day stated and settled between you and the said D. F., in addition to his liability upon two acceptances of mine to his drafts each for 750*l.*, dated 3rd of July, 1867, and payable three and four months after date, and respectively indorsed to you by the said D. F.; and whereas you are pressing for the immediate payment of the said sum of 2205*l.* 3*s.* 9*d.*: now, I do hereby, in consideration of your forbearing to take immediate steps for the recovery of the said sum, guarantee the payment of, and agree to become responsible for, any sum of money for the time being due from the said D. F. to you, whether in addition to the said sum of 2205*l.* 3*s.* 9*d.* or no:"—

Held, that this was a guarantee for future supplies of coal, unlimited both as to time and amount.

THE declaration stated that, on the 23rd of July, 1867, one David French was indebted to the plaintiff in a large sum, to wit, the sum of 2205*l.* 3*s.* 9*d.*, and also was liable to the plaintiff upon two acceptances of the defendant indorsed by the said D. French to the plaintiff, and the plaintiff was pressing the said D. French for the immediate payment of the said sum of 2205*l.* 3*s.* 9*d.*, and thereupon, in consideration that the plaintiff would forbear to take immediate steps for the recovery of the said sum of 2205*l.* 3*s.* 9*d.*, the defendant guaranteed the payment of and agreed to become responsible for any sum of money for the time being due from the said D. French to the plaintiff, whether in addition to the said sum of 2205*l.* 3*s.* 9*d.* or not: Averment, that, after the making of the said agreement and guarantee, and before suit, a large sum, to wit, 2053*l.* 6*s.*, became and was due from D. French to the plaintiff, within the meaning of the said agreement and guarantee; and that

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the plaintiff did forbear to take immediate steps for the recovery of the said sum of 2205*l.* 3*s.* 9*d.*, and that, although all things were done, &c., to entitle the plaintiff to have the agreement performed, and to sue the defendant for the breach thereof thereinafter mentioned, neither D. French nor the defendant had paid to the plaintiff the 2053*l.* 6*s.*, or any part thereof.

Pleas: 1. That the defendant did not guarantee or agree as alleged. 2. That neither the said sum of 2053*l.* 6*s.* nor any part thereof was a sum of money for the time being due from D. French to the plaintiff, within the true intent and meaning of the said agreement and guarantee, as alleged. 3. Payment before action. Issue thereon.

The cause was tried before Keating, J., at the sittings at Westminster after last Trinity Term. The plaintiff is a merchant and coal-factor at Rochester, in Kent. The action was brought to recover the sum of 2053*l.* 6*s.*, the balance due to the plaintiff from David French for coals supplied to him in the way of his trade of a coal-merchant. It appeared that the plaintiff had for some years had dealings with French, and that in the year 1865, French being then largely indebted to him, the plaintiff required security; whereupon the defendant (who was French's brother-in-law) on the 1st of April, 1865, gave the plaintiff a guarantee to enure for twelve months. This guarantee was renewed for a similar period on the 3rd of April, 1866, and again on the 3rd of April, 1867. The last-mentioned guarantee was in the following form:—

"Holborn Wharf, Chatham. April 3, 1867.

"Memorandum. In the event of your supplying Mr. D. French, of Chatham, any coals during the next twelve months from the 1st April last past, I do hereby guarantee the payment to you of the amount for the time being due from Mr. D. French to you for coals sold by you to him. This guarantee to expire at the end of twelve months, viz. 1st of April, 1868.

(signed) "T. H. Pack.

"To E. R. Coles, Esq."

In July, 1867, French's debt to the plaintiff having greatly increased, the plaintiff pressed for a settlement, but ultimately agreed to give him time, and to continue to do business with him

as usual, upon the defendant signing the following guarantee,—the instrument declared on:

"To E. R. Coles, Esq. "Ditton, July 23rd, 1867.

"Whereas Mr. D. French, of Chatham, Kent, coal-merchant, is and stands indebted to you, the said E. R. Coles, in the sum of 2205*l.* 3*s.* 9*d.* upon an account this day stated and settled between you and the said D. French, in addition to his liability upon two certain acceptances of mine to his drafts each for 750*l.*, dated 3rd July, 1867, and payable three and four months after date, and respectively indorsed to you by the said D. French: And whereas you are pressing for the immediate payment of the said sum of 2205*l.* 3*s.* 9*d.*: Now, I do hereby, in consideration of your forbearing to take immediate steps for the recovery of the said sum, guarantee the payment of, and agree to become responsible for, any sum of money for the time being due from the said D. French to you, whether in addition to the said sum of 2205*l.* 3*s.* 9*d.* or no.

(signed) "T. H. Pack."

The plaintiff did forbear to sue French; and the dealings between them continued down to the 24th of February, 1869, when the balance due to the former for coals supplied was 2053*l.* 6*s.*, the sum claimed in this action,—the two bills for 750*l.* each, as well as the balance due at the date of the last guarantee, having in the meantime been paid off. In March French became bankrupt.

On the part of the defendant it was submitted that there was no sufficient consideration for the guarantee of the 23rd of July, 1867, and that it was not a continuing guarantee, or, at all events, not beyond the continuance of the debt therein recited and the currency of the two bills of exchange. *Semple* v. *Pink* (1) was relied on.

A verdict was entered for the plaintiff for 2053*l.* 6*s.*, leave being reserved to the defendant to move to enter the verdict for him.

Denman, Q.C., obtained a rule nisi, on the ground that the guarantee sued on did not extend to the sum in respect of which the action was brought, and that there was no good consideration for the guarantee.

(1) 1 Exch. 74.

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Prentice, Q.C., and *F. M. White*, shewed cause. Construing this document by the light of the surrounding circumstances, it is clearly a continuing guarantee for future supplies of coals, though there is no specific mention therein of a continuing dealing. Bearing in mind that, at the time the guarantee declared on was given, the guarantee of the 3rd of April, 1867, was still subsisting, and that the defendant was already liable on the two bills, which would become due before the expiration of the year, it is impossible to conceive language better adapted to convey the notion that this like the former documents was to be a guarantee for future supplies, the only difference being that it was to be unlimited in point of time. There is no pretence for the restriction sought to be put by the defendant upon the words used. The manifest intention was to substitute for the previous annual ones, a general guarantee which should subsist until countermanded: *Offord* v. *Davis*. (1) The case of *Semple* v. *Pink* (2), therefore, has no application; and, if it had, it was clearly overruled by *Oldershaw* v. *King*. (3)

As to the construction of the document, the following cases were also referred to: *Bastow* v. *Bennett* (4); *Woolley* v. *Jennings* (5); *Hargreave* v. *Smee* (6); *Hitchcock* v. *Humphrey* (7); *Mayer* v. *Isaac* (8); *Nicholson* v. *Paget* (9); *Mason* v. *Pritchard* (10); *Hoad* v. *Grace* (11); *Heffield* v. *Meadows*. (12)

Denman, Q.C., and *Cohen*, in support of the rule. The true rule of construction which is to be applied to instruments of this description is that laid down by Sir James Mansfield, C.J., in *Pearsall* v. *Somerset* (13), by Martin, B., in *Wood* v. *Priestner* (14), and by Story, J., in *Cremer* v. *Higginson*. (15) The meaning of the parties is to be gathered from the language they have used, coupled with the surrounding circumstances. There is no decision which affirms that the words are to be construed most strongly against the

(1) 12 C. B. (N. S.) 748; 31 L. J. (C.P.) 319.
(2) 1 Exch. 74.
(3) 2 H. & N. 517; 27 L. J. (Ex.) 120.
(4) 3 Camp. 220.
(5) 5 B. & C. 165.
(6) 6 Bing. 244.
(7) 5 M. & G. 559.
(8) 6 M. & W. 605.
(9) 1 Cr. & M. 48.
(10) 12 East, 227.
(11) 7 H. & N. 494; 31 L. J. (Ex.) 98.
(12) Law Rep. 4 C. P. 595.
(13) 4 Taunt. at p. 598.
(14) Law Rep. 2 Ex. 66.
(15) 1 Mason, 323.

(3) 5 C 3 Jur NS 1152.

guarantor, though dicta to that effect are to be found in the books. The fair result of the authorities is, that no greater liability is to be implied than the language and the circumstances reasonably warrant. Reading the guarantee as if the memorandum of the 3rd of April, 1867, had been recited therein (which is the most favourable view for the plaintiff), the obvious meaning is, that the guarantee of the 23rd of July, 1867, was to cover the debt then due as well as the two outstanding bills; or, if it contemplated a future supply of coals to French, it was only to cover such coals as might be supplied whilst that debt should remain unpaid and the bills should be outstanding. Either of these constructions will abundantly satisfy the words of the guarantee. There is not a word in it which shews that a continued supply of coals for an indefinite period was contemplated; and it is not reasonable to suppose that the defendant would have consented to enter into so great a liability as the contention on the part of the plaintiff suggests, viz. a liability unlimited as to time as well as amount. *Allnutt* v. *Ashenden* (1), and the cases collected in Chitty on Contracts, 8th ed. 489 et seq. were also referred to.

Then, as to the consideration. Where a consideration is expressed on the face of the instrument, the Mercantile Law Amendment Act (19 & 20 Vict. c. 97, s. 3), does not warrant the Court in implying one. The consideration here expressed, viz. forbearance to press for immediate payment of an existing debt, clearly is not sufficient. In *Semple* v. *Pink* (2), the defendant agreed to guarantee the payment of a promissory note made by one Leigh in favour of the plaintiff, and due on the 2nd of November, 1844. The note being dishonoured, the defendant gave the plaintiff a further guarantee, as follows:—"I request you will hold over the promissory note in favour of Mr. Leigh, dated, &c., for 200*l.*; and, in consideration of your so doing, I undertake to continue in all respects my guarantee of the same:" and it was held that there was no sufficient consideration for the defendant's promise. It has been contended that that case has been overruled by *Oldershaw* v. *King*. (3) But, in the last-mentioned case, all the judgments, with the exception of that of Crompton, J., distinctly put

(1) 5 M. & G. 392. (2) 1 Exch. 74.
(3) 2 H. & N. 517; 27 L. J. (Ex.) 120.

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the decision upon other grounds. *Semple* v. *Pink* (1) has never been actually overruled, and it is quite in harmony with all the authorities.

BOVILL, C.J. The document in question, like every other guarantee, must be construed according to the intention of the parties as expressed by the language they have employed, understanding it fairly in the sense in which it is used; and this intention is best ascertained by looking to the relative position of the parties at the time the instrument is written. Construing this guarantee according to the principle above suggested, I come to the conclusion that it is a continuing guarantee, and that it includes the debt now sued for. The argument on the one side and on the other has displayed much research, and very many cases have been referred to; but it must be observed that the language of one document of this kind affords little or no guide to the construction of another which is given under other and different circumstances. In this guarantee there is no limit as to amount. It is no legitimate argument to say that it is improbable that the defendant should have contemplated taking upon himself so extensive a liability; and, looking at the relationship existing between French and the defendant, and seeing that the latter was already liable under an existing guarantee to the extent of 2,200*l.*, and for the 1,500*l.* on the two outstanding bills, I think there is nothing unreasonable in holding that he intended his liability under the guarantee declared on to be unlimited in point of amount. Then, I find no limit as to time, except such as may arise from the words "for the time being." Those words might, no doubt, have reference to the time when the guarantee was given. But, looking at the former guarantees, which contain similar words without importing any limitation, I think they cannot be held to apply to the time of giving the guarantee, but must have been meant to refer to a future time: and, if so, the guarantee must be construed to be unlimited as to time. It was contended on the part of the defendant that the guarantee in question was to be confined to the existing debt and the accruing debt on the bills. But the defendant was already liable, as

(1) 1 Exch. 74.

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acceptor, on the two bills; and the guarantee will not admit of that construction, without introducing into it words of limitation which are not found in it. Construing the language of this instrument, therefore, according to its ordinary sense, and looking at the surrounding circumstances, I cannot come to any other conclusion than that it was intended to be unlimited as well in point of time as in point of amount. I think the rule should be discharged. As to the sufficiency of the consideration, having come to the conclusion that the guarantee applies to future debts, no question can arise, and therefore *Semple* v. *Pink* (1) has no application. But I am strongly of opinion that that case was overruled by *Oldershaw* v. *King*. (2)

KEATING, J. I am of the same opinion. The construction which Mr. Cohen, in his ingenious argument, asks us to put upon this guarantee is, that, so long only as any part of the debt of 2205*l.* 3*s.* 9*d.* remained unpaid and the two bills were running, it was to be effectual to any extent. I think it is highly improbable that the defendant would have executed a guarantee of such a nature as to make it French's interest to keep the debt due to the plaintiff on foot as long as possible, which would in effect have rendered the guarantee irrevocable. Still, however improbable, if the words were such as to require us to put such a construction upon them, we must have given effect to them. Upon the whole, I think the most natural construction to be put upon the instrument is that put upon it by my Lord; and it is enough to say that I entirely concur in the reasons he has given.

BRETT, J. With regard to the question of consideration, I cannot help thinking that *Semple* v. *Pink* (1) is overruled by *Oldershaw* v. *King*. (2) And, even if it were not, yet if we hold this to be a continuing guarantee, there is, by necessary implication, at once a sufficient consideration beyond forbearance to sue. The question therefore is, what is the extent of the guarantee. Two interpretations have been suggested on the part of the defendant; one, that this was a guarantee for the 2205*l.* 3*s.* 9*d* already due and the 1500*l.* accruing on the two acceptances outstanding, and not for a future

(1) 1 Exch. 74.

(2) 2 H. & N. 517; 27 L. J. (Ex.) 120.

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supply of goods; the other, that it was a guarantee for the 2205*l.* 3*s.* 9*d.* and the 1500*l.*, and also for any coals which might be sold to French whilst those sums should remain unpaid. As to the first, if that were the true construction of this guarantee, the only effect of it would be to save the plaintiff the trouble of proving the amount of his demand in a Court of law. It is not probable that a guarantee would be given for such a purpose; and it is impossible, as it seems to me, to avoid construing the words "whether in addition to the said sum of 2205*l.* 3*s.* 9*d.* or no," as implying a future supply. I cannot, therefore, accept Mr. Denman's construction of this guarantee. As to the second construction, if it had been intended to confine the security to the time suggested by Mr. Cohen, if such a limitation had been intended it was very easy to express it. The parties have not done so. The defendant agrees to be responsible "for any sum of money for the time being due" from French. There is no limitation of time,—not a word which sustains Mr. Cohen's contention. The conclusion therefore to which I feel obliged to come is, that the defendant intended to make himself responsible for goods supplied to French at any time until the guarantee should be revoked.

Rule discharged.

Attorneys for plaintiff: *Nickinson, Prall, & Nickinson.*
Attorneys for defendant: *Monckton & Monckton.*

[IN THE EXCHEQUER CHAMBER.]

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Nov. 30.

TEBB *v.* HODGE AND CUTTEN.

Agreement for Lease—Equitable Mortgage of Fittings and Fixtures.

The plaintiff agreed to let to one B. premises in Holborn, which B. was to fit up forthwith as a luncheon-bar and restaurant, such fittings to be of the value of 500*l.* and to the plaintiff's satisfaction, and B. was to pay a premium of 1000*l.*, upon payment of which, "the premises being fitted up as aforesaid," the plaintiff was to grant B., and B. agreed to take, a lease for twenty-one years; and the plaintiff further agreed to lend or obtain for B., "upon security of the said premises as fitted and licensed," 1000*l.* for two years at 5 per cent. Before any lease was granted or any money paid, B. became bankrupt, and his assignee seized and sold the fittings and fixtures under an order of the Court:—

Held (affirming the judgment of the Court of Common Pleas), that, until the execution of the proposed lease, the agreement constituted an equitable contract between the plaintiff and B. that "the premises as fitted and licensed" should stand as a security for the 1000*l.* premium, and consequently that the plaintiff was entitled to them as equitable mortgagee.

APPEAL by the defendants against a decision of the Court of Common Pleas.

The first count of the declaration charged the defendants with breaking and entering the plaintiff's house called The Grays Inn Restaurant, and destroying and converting the fixtures, fittings, &c., of the plaintiff therein. The second count was for the conversion of the like goods.

The third count stated that, on the 18th of December, 1867, the plaintiff being lawfully possessed of the premises in the agreement thereinafter mentioned, an agreement was made and entered into between the plaintiff and one Barrows, as follows, that is to say,—"Agreement made the 18th of December, 1867, between R. P. Tebb, of &c., of the one part, and J. G. Barrows, of &c., of the other part, whereby Tebb agrees to grant and Barrows to take a repairing lease of the Grays Inn Restaurant, No. 19, High Holborn, comprising, &c., at the clear net rent of 370*l.* per annum; also the small office, &c., at the clear net rent of 80*l.* per annum, for the term of twenty-one years from the 24th of June, 1866, less the last fourteen days thereof, upon the following conditions,—Barrows agrees to pay Tebb, his executors, &c., the sum of 1000*l.* on

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the granting of the above lease of the above-described premises, being the consideration for the same; also to fit up the said premises forthwith in a substantial and appropriate manner as a first-class luncheon-bar and restaurant, such fittings to be of the value of 500*l.* at least, and to be completed to the satisfaction of Tebb, his executors, &c., on or before the 11th of February next (and in this respect time shall be of the essence of the contract); and, upon payment of the said consideration money, the said premises being fitted up as aforesaid, Tebb, his executors, &c., will grant the said lease. . . . And Tebb agrees to lend or obtain for Barrows, upon security of the said premises as fitted and licensed, the sum of 1000*l.* for the term of two years from Christmas, 1867, at 5 per cent. per annum interest, Barrows to have the option of repaying the said mortgage and interest at any earlier period, by giving six months' notice or on payment of three months' additional interest in lieu of notice: And it is also provided that, if the lessee shall assign or underlet the premises before the expiration of the said two years, it is agreed that the said mortgage of 1000*l.*, with interest thereon, shall be paid off and discharged: And it is hereby mutually agreed by and between the said parties that, if Barrows shall fail to carry out all or any of the stipulations and conditions herein contained, or should the rent remain unpaid beyond fifteen days from any quarter-day, or should the premises not be fitted up in the manner and within the time hereinbefore stated, or should the same become vacant or otherwise discontinued to be conducted in the ordinary way as a respectable restaurant and luncheon-bar, then and in each or any of such cases it shall be lawful for Tebb to re-enter and take possession of the premises without the necessity of any formal process at law in as full and complete a manner as if this agreement had never been entered into:" And the plaintiff then delivered possession of the said premises in the agreement mentioned to Barrows under and by virtue of the said agreement, and he entered into the premises and became possessed thereof under and by virtue of the agreement as tenant thereof to the plaintiff, the reversionary estate and interest therein, subject to the said tenancy, then belonging to the plaintiff; and Barrows, under and by virtue of the agreement, and in performance thereof on his part, fitted up the premises in a

substantial and appropriate manner as a first-class luncheon-bar and restaurant, with divers appropriate and substantial fittings of great value, to wit, of the value of 1000*l.*; and afterwards and whilst Barrows was so possessed of the premises, and during his tenancy, and whilst the plaintiff was so entitled to the reversion of and in the said premises, fixtures, and fittings, subject to the said tenancy of Barrows under the said agreement, the defendants wrongfully severed and removed the said fixtures, and carried away and converted the same to their own use, &c.

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The defendants pleaded, amongst other pleas, not guilty, not possessed, and a further plea that, before any of the times when &c., Barrows became bankrupt, and at the time he so became bankrupt, he had, by the consent and permission of the plaintiff, the true owner thereof, in his possession, order, and disposition divers goods and chattels, to wit, the alleged fixtures in the first count mentioned, and the goods in the second count mentioned, and the alleged fixtures and fittings in the third count mentioned, whereof he was reputed owner, and whereof he had taken upon himself the sale, alteration, and disposition as owner; and the Court of Bankruptcy, duly authorized in that behalf, then duly ordered the same to be sold and disposed of for the benefit of the creditors of the said bankrupt under the said bankruptcy; and thereupon the defendant Hodge, then being the assignee of the estate and effects of Barrows under the said bankruptcy, and the defendant Cutten, as his servant and by his command, sold and disposed of the said goods, &c. Issue thereon.

1. The plaintiff is an auctioneer and estate agent at 139, Cheapside. The defendant Hodge is a gas-chandelier manufacturer, carrying on business in Hatton Garden, and is the assignee of Barrows, a bankrupt. The defendant Cutten is an auctioneer.

2. On the 18th of December, 1867, the agreement set forth in the third count of the declaration was entered into between the plaintiff and Barrows.

3. Barrows took immediate possession of the premises at 19, High Holborn in the agreement mentioned, and known as the Grays Inn Restaurant.

4. At the time Barrows took possession of the premises, they

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had been recently rebuilt by the plaintiff, and Barrows immediately proceeded to fit the same up with fixtures, including those which are the subject of this action, as a restaurant, in pursuance of the agreement.

5. The lease in the agreement mentioned was not executed, nor was the consideration of 1000*l.* in fact paid for the same, nor was a sum of 1000*l.* or any sum in fact advanced by the plaintiff to Barrows: but, after Barrows had fitted up the premises, the plaintiff at his request inspected the same and expressed his satisfaction, and told Barrows that he was ready to grant him the lease whenever required; and the plaintiff asked Barrows to take up the lease. Barrows replied that he did not wish to take it up just then, as he could deposit the agreement as a security. At the request of Barrows, the plaintiff wrote him a letter. (1) Afterwards, Barrows applied to the plaintiff for liberty to assign the agreement by way of mortgage: but the plaintiff refused his consent till the lease had been taken up. The plaintiff consented to the agreement being deposited as a security, subject to his claim of 1000*l.* Barrows never paid any rent.

6. On the 15th of April, 1868, Barrows was adjudicated a bankrupt upon a creditor's petition.

7. On the 5th of May, 1868, the defendant Hodge was appointed creditors' assignee, and he immediately proceeded to take possession of the bankrupt's estate.

8. The only estate given up by the bankrupt to his assignee was, the goods, fixtures, fittings, stock in trade, and effects on the premises at No. 19, High Holborn; and an application was made to the Court of Bankruptcy for an order under s. 125 of the Bankruptcy Law Consolidation Act, 1849.

9. This order was granted. [A copy thereof was set out.]

10. The defendant Cutten examined the goods, fixtures, fittings, and effects at Nos. 19 and 20, High Holborn, and caused a catalogue of the same to be prepared, and advertised them to be sold by auction on the 20th of May, 1868.

11. Immediately upon the sale being advertised, the plaintiff caused to be served upon the defendants a notice to the effect that he claimed the lots numbered 1 to 21 inclusive, and lots 128, 129,

(1) The letter was not set out in the case.

and 131, in the said catalogue, and cautioning the defendants not to sell the same.

12. The defendants nevertheless sold the whole of the lots.

13. The order of the Court of Bankruptcy authorizing the defendant Hodge to sell was read at the sale, in the presence of the plaintiff.

14. The plaintiff himself bought all the fixtures, viz. lots 1 to 21, and the same were never severed. The other fixtures and fittings sold by the defendants to be severed, were purchased by different purchasers and severed by such purchasers from the premises.

15. The defendant Hodge paid rent for the premises up to March, 1868. He afterwards renounced the agreement for a lease, pursuant to s. 131 of 24 & 25 Vict. c. 134, and delivered up the key of the premises to the plaintiff.

16. The plaintiff then brought this action to recover the value of the fixtures claimed by him, and also damages for the trespass to the premises, and for alleged injuries to his reversion.

17. At the trial before Montague Smith, J., at the sittings at Westminster after Michaelmas Term, 1868, a verdict was taken for the plaintiff on the first and second counts, damages 150*l.*, being the sum realized at the sale of the fixtures, and also for the plaintiff on the third count, damages 10*l.*, being the agreed amount of damage done to the premises by the removal of the fixtures; leave being reserved to the defendants to move to have the verdict entered for them,—the Court to draw conclusions of fact.

18. A rule nisi was accordingly obtained in Hilary Term, 1869, on the grounds, amongst others, "that the plaintiff was not mortgagee either at law or in equity; and that the goods were in the order and disposition of the bankrupt with the consent of the true owner thereof, within the meaning of the 125th section of the Bankrupt Law Consolidation Act, 1849, and that the order in bankruptcy justified the defendants in selling the goods."

Parry, Serjt., and *Beasley*, in Easter Term last, shewed cause against this rule, citing *Ex parte Gawan* (1), *Mather* v. *Fraser* (2), *Hankey* v. *Vernon* (3), and *Holroyd* v. *Marshall.* (4)

(1) 5 D. M. & G. 403; 25 L. J. (Bk.) 1.

(2) 2 K. & J. 536; 25 L. J. (Ch.) 361.

(3) 2 Cox, Eq. 12.

(4) 4 H. L. 191; 33 L. J. (Ch.) 193.

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Montagu Chambers, Q.C., in support of the rule, referred to 1 Powell on Mortgages, 20.

THE COURT held that the result of the transaction between the parties was, that the plaintiff was equitable mortgagee of the fixtures and fittings as part of the premises comprised in the demise, and that 12 & 13 Vict. c. 106, conferred no title on the defendant Hodge as assignee of Barrows.

Against this decision the defendants appealed.

Bush (*Montagu Chambers, Q.C.*, with him), for the defendants. The judgment of the Court below proceeds upon the assumption that the plaintiff was equitable mortgagee of the premises comprised in the agreement of the 18th of December, 1867. The agreement consists of two parts:—1. An agreement by the plaintiff to grant to Barrows a lease of the premises upon certain terms; 2. An agreement by the plaintiff to lend or to procure for Barrows a loan of 1000*l.* on mortgage of the premises as fitted and licensed. The agreement to demise was for the benefit of both parties: but the agreement for the mortgage was for the benefit of Barrows only. It was optional with him to grant the mortgage or not; and he alone could have enforced performance of that part of the agreement. No lease having been granted, there could be no mortgage either legal or equitable. The position of the plaintiff, at best, could only be that of having a lien for the unpaid purchase-money.

[CHANNELL, B. The fixtures in question, which were intended to add to the permanent value of the property, may be said to have formed part of the subject of demise to Barrows. If the plaintiff was entitled to a specific performance of the agreement, he had an equitable interest in the fixtures.]

He could only be entitled to enforce by bill for a specific performance the first part of the agreement. There is not a word about fixtures in that part of the agreement which relates to the granting of a lease.

[CHANNELL, B. The premises demised are the Grays Inn Restaurant, as fitted up. So long as the mortgage enured, the fixtures and fittings were to be part of the security.]

The mere execution of the agreement did not create a mortgage: *Ex parte Coombe, In re Beavan.* (1)

[CHANNELL, B. All that that case shews is, that a parol agreement to deposit a lease when granted, as security for a sum advanced, does not constitute an equitable mortgage.]

Beasley, for the plaintiff, was not called upon.

KELLY, C.B. The plaintiff, in December, 1867, entered into an agreement with Barrows (whose assignee in bankruptcy the defendant Hodge is) to grant him a lease for twenty-one years of premises in Holborn of which Barrows was already in possession or of which he was to take immediate possession. One of the terms of the agreement was that Barrows should fit up the premises forthwith in a substantial and appropriate manner as a first-class luncheon-bar and restaurant, such fittings to be of the value of 500*l.* at least, and to be completed to the satisfaction of the plaintiff on or before the 11th of February then next. Barrows being thus in possession, and the fixtures and fittings having been completed to the satisfaction of the plaintiff before April, 1868, the premises were in a condition to entitle Barrows to call for a lease, and to entitle the plaintiff to call upon him to accept a lease; and the plaintiff did in fact offer Barrows a lease. Another term of the agreement upon which the lease was to be granted was, that Barrows should pay 1000*l.* by way of premium. It seems that Barrows was not in a condition to pay that sum; and it was also made a term of the agreement that the plaintiff should advance or procure for him an advance of 1000*l.* for the period of two years, at 5 per cent. interest, for which advance "the premises as fitted and licensed" were to constitute the security; and it was further agreed that, if the lessee should assign or underlet the premises before the expiration of the two years, the mortgage of 1000*l.*, with interest, should be paid off and discharged. The plaintiff was ready to complete the contract on his part and to grant Barrows the stipulated lease; but Barrows declined to take the lease then, "as he could deposit the agreement as a security." The case states that Barrows afterwards "applied to the plaintiff for liberty to assign the agreement, by way of mortgage: but the plaintiff

(1) 4 Madd. 249.

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refused his consent till the lease had been taken up. The plaintiff consented to the agreement being deposited as a security, subject to his claim of 1000*l.*" Thus, the plaintiff refused to abandon the grant of the lease for twenty-one years, and to allow the substitution of the agreement as a completion of the transaction. It seems to me to be quite clear that there was an agreement between the parties that, until the lease was executed, the agreement of December, 1867, was to be a security to the plaintiff for all that he was entitled to under it. Rebus sic stantibus, the plaintiff could at any moment have enforced the execution of a mortgage for the 1000*l.*, inasmuch as there was an equitable contract between him and Barrows that "the premises as fitted and licensed" should stand as a security for that sum. The result, as it seems to me is, that the plaintiff became equitable mortgagee of the premises with the fittings and fixtures, and the defendants had no right to seize and sell them under the adjudication of bankruptcy against Barrows, and consequently this action is maintainable. The judgment of the Court of Common Pleas must be affirmed.

MELLOR, J., and CHANNELL, PIGOTT, and CLEASBY, BB., concurred.

Judgment affirmed.

Attorneys for plaintiff: *Evans & Laing.*
Attorneys for defendants: *Lewis & Sons.*

Nov. 19.

BRISTOW AND ANOTHER *v.* BOOTH.

Copyhold—Fines on Admittance of a Substituted Trustee under the Trustee Acts, 13 & 14 Vict. c. 60, and 15 & 16 Vict. c. 55.

56@271,

P. P. the younger, devisee in trust under the will of his father P. P. the elder of copyhold tenements of the manor of Woodford, in Essex, was duly admitted as tenant, and paid his fine. He died, having by his will devised all his estate of what nature or kind soever to S. P., his widow, whom he appointed sole executrix of his will.

S. P. proved the will, but was never admitted to the copyhold tenements; and she shortly afterwards executed a deed of disclaimer as to them.

The customary heir-at-law of P. P. the younger was his nephew, P. J. P.: but, he being abroad, out of the jurisdiction of the Court, a decree was made by the Master of the Rolls (affirmed by the Lords Justices on appeal), whereby the

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defendant was appointed "a trustee of the will of P. P. the elder so far as it related to the copyhold or customary hereditaments devised thereby, in substitution for P. P. the younger, deceased," and the estate vested in him, under the powers of the Trustee Acts, 13 & 14 Vict. c. 60, s. 32, and 15 & 16 Vict. c. 55, s. 9.

Upon the admittance of the defendant, the substituted trustee under the above decree, the lords of the manor claimed two fines,—one for his admittance, and another as for the admittance of P. J. P., the customary heir:—

Held, that the lords were entitled to one fine only.

1. THIS was an action brought by the plaintiffs, the lords of the manor of Woodford, in Essex, to recover 266*l.* for fines claimed to be payable by the defendant, as customary tenant of certain copyhold or customary tenements of the manor, to the plaintiffs as lords.

2. On the 12th of April, 1817, Peter Paterson was, on the surrender of Sir E. B. Sandys, admitted tenant of the said copyhold or customary tenements of the manor, to hold to him, his heirs and assigns, according to the custom of the said manor.

3. The custom of the manor, as to descent, is borough English, and extends to collaterals.

4. Peter Paterson died on the 26th of October, 1860, and by his will, dated the 1st of April, 1857, he devised all his copyhold and customary hereditaments unto his son Peter Paterson, his heirs and assigns, according to the custom of the manor whereof the same were held, upon the trusts and subject to the powers, provisions, and declarations thereinafter declared.

5. The will was proved on the 12th of December, 1860, by Sophia Paterson, Peter Paterson the son, and John White, the executors.

6. On the 24th of October, 1861, Peter Paterson, the son, was at a court held for the manor admitted tenant to the lord of the manor of the copyhold or customary tenements whereof Peter Paterson the father died so seised, and which were by his will so devised to Peter Paterson the son, to hold the same, with the appurtenances, unto Peter Paterson the son, his heirs and assigns, according to the tenor and effect of the will, and according to the custom of the manor, to hold of the lord by the rod, by copy of court-roll, at the will of the lord, according to the custom of the said manor, by fealty, and the rents, &c., therefor due and of right accustomed to be paid, done, and performed for the same.

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7. The custom of the manor of Woodford does not recognize or take any notice of trusts: and the custom of the manor makes no difference in respect of the fines, whether the tenant is admitted trustee or in his own beneficial right.

8. Peter Paterson the son died on the 20th of June, 1864, without issue, having made a will, as follows:—

"I give, devise, and bequeath all my real and personal estate and effects of what nature or kind soever unto my dear wife Sarah Paterson, her heirs, &c., according to the respective natures and qualities thereof, for her and their own use and benefit absolutely: and I appoint my said wife Sarah Paterson sole executrix of this my will, &c. Dated 3rd March, 1862."

9. The will of Peter Paterson the son was proved on the 14th of July, 1864, by Sarah Paterson, the widow and sole executrix: and by the will Sarah Paterson, as such devisee, was according to the custom of the manor the proper person to be admitted tenant on the court-rolls of the manor of the customary tenements whereof Peter Paterson the son died seised or possessed as trustee under the will of his father, Peter Paterson the elder.

10. Sarah Paterson was never admitted tenant of the customary hereditaments hereinbefore mentioned, or any of them; and, on the 10th of May, 1865, she executed a deed of disclaimer, whereby, —after reciting that Peter Paterson the elder was seised of certain copyholds, his will, whereby he devised all his copyhold and customary hereditaments unto his son Peter Paterson (hereinafter called Peter Paterson the younger), his heirs and assigns, according to the custom of the manor or manors whereof the same were held, upon the trusts in the said will mentioned; that Peter Paterson the elder died on the 26th of October, 1860, without having revoked or altered his said will; that the will was duly proved on the 12th of December, 1860; that Peter Paterson the younger was duly admitted to the said copyhold hereditaments as devisee in trust under the will of Peter Paterson the elder; that Peter Paterson the younger by his will, dated the 3rd of March, 1862, devised his real and personal estate and effects unto his wife Sarah Paterson, her heirs, &c., according to the respective natures and qualities thereof, for her and their own use and benefit absolutely, and appointed her sole executrix of that his will; that Peter

Paterson the younger died on the 20th of June, 1864, without having revoked or altered his will, which was duly proved by Sarah Paterson on the 14th of July, 1864; that Sarah Paterson had not been admitted to the copyhold hereditaments so vested in Peter Paterson the younger, nor had she in anywise intermeddled with the execution of the trusts concerning the same remaining to be performed under the will of Peter Paterson the elder, and that she was desirous and had determined to disclaim all estate and interest in the said copyhold hereditaments, and all the trusts and powers relating thereto,—it was witnessed "that the said Sarah Paterson doth hereby absolutely renounce and disclaim all and singular the copyhold and customary messuages, &c., which by the will of Peter Paterson the elder were given and devised to Peter Paterson the younger in trust as aforesaid, and which were included in the general devise to her in the will of Peter Paterson the younger contained, and all and singular powers, trusts, &c., relating to or in anywise concerning or affecting the same:" Provided always that the disclaimer should not in anywise prejudice or affect any of the devises or bequests in the will of Peter Paterson the younger to her other than the devise of the copyhold hereditaments so vested in Peter Paterson the younger under the will of the said Peter Paterson the elder as aforesaid, nor the office of executrix, &c.

11. At the date and execution of the disclaimer, the defendant admits that one Peter James Paterson was the nephew and customary heir-at-law of the said Peter Paterson the younger, according to the custom of the manor of Woodford; and that Peter James Paterson was then and is now living out of the jurisdiction of Her Majesty's Courts of law and equity: and the said Sarah Paterson has not at any time made any claim for free-bench in respect of the said copyhold or customary hereditaments.

12. The plaintiffs contended that, on the execution of the disclaimer by Sarah Paterson, the copyhold or customary hereditaments of which Peter Paterson the younger died seised as devisee and trustee under the will of Peter Paterson the elder, descended to and became vested in Peter James Paterson, as the customary heir-at-law of Peter Paterson the younger; and, on such descent, the plaintiffs, as lords of the manor of Woodford, claimed to be entitled to a fine.

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12. a. On the 30th of May, 1865, Sarah Paterson, in conjunction with William Paterson and his infant children, and Sophia Paterson and John White (all the said parties except Sarah Paterson being plaintiffs and defendants in a suit then pending in Chancery), presented their petition to the Master of the Rolls, which, after stating the will and codicils of Peter Paterson the elder, the trusts thereby declared of his real and copyhold or customary hereditaments, his death, proof of his will and codicils, the admission of Peter Paterson the younger to the copyhold or customary hereditaments, a suit instituted in 1860 in Chancery for administration of the estate of Peter Paterson the elder, the proceedings which had taken place in the suit, the will of Peter Paterson the younger, his death, proof of his will, and the deed of disclaimer of Sarah Paterson,—then stated that it had become necessary to appoint a new trustee of the copyhold hereditaments, in substitution for Peter Paterson the younger, and it was impossible so to do without the assistance of the Court of Chancery; and that Abraham Booth (the defendant in this action) was a fit and proper person to be appointed trustee of the said copyhold hereditaments, and was willing to accept the office of such trustee. The petition then prayed (amongst other things) that the defendant (Booth) might be appointed such trustee, and that all the estate and interest in the copyhold hereditaments which would have vested in Sarah Paterson, if she had accepted the devise of the said hereditaments in the will of Peter Paterson the younger contained, might vest in Booth, upon the trusts by the will of Peter Paterson the elder declared concerning the same, or such of them as were then subsisting or capable of taking effect.

13. On the 3rd of June, 1865, the petition was heard before the Master of the Rolls, who by an order of that date, amongst other things, ordered that Abraham Booth (the now defendant) be appointed a trustee of the will of Peter Paterson the elder, so far as it related to the copyhold or customary hereditaments devised thereby, in substitution for Peter Paterson the younger, deceased; and he also ordered that all the estate and interest in the said copyhold or customary hereditaments devised by the will of Peter Paterson the elder which would have vested in Sarah Paterson if she had accepted the devise of the same hereditaments in the will

of Peter Paterson the younger contained, should vest in Abraham Booth, upon the trusts by the will of Peter Paterson the elder declared concerning the same, or such of them as were then subsisting or capable of taking effect.

14. The lords and stewards of the manor of Woodford were not, nor were nor was any or either of them, parties or party to the petition of Sarah Paterson and others, or other proceedings on which the order of the Master of the Rolls of the 3rd of June, 1865, was made; nor had the said lords and stewards or any or either of them any opportunity whatever of being heard either by counsel or otherwise against the making of the order; and the said lords and stewards, or any or either of them, did not consent to the making thereof.

15. On the 23rd of January, 1866, the plaintiffs, as lords of the manor of Woodford, before John Coverdale, then steward, held a general court-baron and customary court of the manor; at which court the defendant appeared, and by virtue of the order of the 3rd of June, 1865, claimed to be admitted as a tenant of the manor in respect of the copyhold and customary hereditaments devised by the will of Peter Paterson the elder under the said order, and offered to pay one fine on being admitted; and Coverdale, as such steward, offered to admit him as such tenant on payment of two fines; but he refused to pay two fines on the admission; and the steward refused to admit him: and subsequently, at the said court, a proclamation was made, according to the custom of the manor, for the heir of Peter Paterson the younger to come into court and take admittance to the said copyhold or customary hereditaments, otherwise the same would be seized into the hands of the lords of the manor for want of a tenant; and the said Peter James Paterson, the nephew and customary heir-at-law of Peter Paterson the younger did not appear and apply to be admitted, and has never since appeared, and has not in fact been admitted a tenant of the said manor, according to the custom thereof, in respect of the copyhold or customary hereditaments devised by the will of Peter Paterson the elder.

16. On the 16th of April, 1866, the plaintiffs, as lords of the manor of Woodford, presented their petition in the before-mentioned suit to the Master of the Rolls, and prayed that the order

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of the 3rd of June, 1865, might be discharged or reversed, and that, if necessary, the petition upon which such order was made might be re-heard by him. The petition came on to be heard before the Master of the Rolls; and on such hearing he dismissed the petition, with costs. (u)

17. On the 30th of April, 1866, the plaintiffs presented their petition of appeal to the Lord Chancellor.

18. Such petition came on to be heard before the Lords Justices on the 30th of May, 1866, who ordered that the orders of the Master of the Rolls of the 3rd of June, 1865, and 24th of April, 1866, so far as they related to the copyhold premises held of the manor of Woodford should be varied, and should be as follows:— "Their lordships do order that the said Abraham Booth be appointed a trustee of the will of Peter Paterson the elder, in substitution for Peter Paterson the younger, deceased: And, the petitioners, as lords of the manor of Woodford, by their counsel consenting, and Booth by his counsel undertaking to admit, in any action at law to be brought by the lords for their fine or fines, that he has been admitted to the copyhold and customary hereditaments hereinafter mentioned, it is ordered that, without prejudice to any question what fine or fines is or are payable to the lords of the manor in respect of the said hereditaments, the copyhold or customary hereditaments devised by the will of Peter Paterson the elder, and held of the said manor of Woodford, do vest in the said Abraham Booth for the estate of the said Peter Paterson the younger therein, to be held by the said Abraham Booth upon the existing trusts of the said will: And it is ordered that the costs of the petition presented to the Master of the Rolls on the 16th of April, 1866, and of the appeal petition, and of the mandamus in the petition mentioned, and any other costs, be reserved until after the action by the petitioners for the said fine or fines shall have been disposed of."

19. The defendant, for the purposes of this case, admits that he was duly admitted tenant of the said copyhold or customary tenements to the plaintiffs as lords of the said manor, and that the plaintiffs are entitled to one fine payable by the defendant for such his admission, and that the said hereditaments are worth about 75*l.* a year. And the plaintiffs, for the purposes of this case, admit

(u) Reported 1 L. R. Eq. 31: 35 Beav. 506: 12 Jur. N. S. 468

that the defendant was willing and offered to pay one fine for admission, and that the plaintiffs refused to accept such one fine, and claimed to have two fines.

20. By the custom of the manor, a fine is payable upon the descent of the copyhold to the customary heir: and there is evidence that, if the customary heir has not been admitted, the person who next claims to be admitted has never been admitted except upon payment of two fines and two sets of fees to the lords and stewards,—the payment of two fines and sets of fees having been invariably enforced in such cases: but, in all cases of persons claiming to be admitted after a descent to the customary heir where the customary heir has not been admitted, the person so claiming to be admitted has claimed through the heir.

21. The defendant contends that the custom for the payment of two fines and sets of fees is not applicable to him under the circumstances stated in this case.

22. No admission fees or fines have been paid in respect of the said hereditaments to the lords and stewards of the said manor, or either of them, since the death of Peter Paterson the younger; and the question between the parties is whether two fines and sets of fees are payable, or only one.

The question for the opinion of the Court is,—are the plaintiffs as lords of the said manor, on the admittance of Abraham Booth as tenant of the said copyhold and customary hereditaments under the facts before mentioned, entitled to one fine or two fines, or to a double fine?

Archibald (*Cowie* with him), for the plaintiffs. The question is whether, upon the true construction of the Trustee Acts of 1850 and 1852 (13 & 14 Vict. c. 60, and 15 & 16 Vict. c. 55), and the order of the Lords Justices of the 30th of May, 1866, in addition to the fine payable by the customary heir, a second fine is payable by reason of the devolution of the estate to the present defendant. He claims through Peter James Paterson, the customary heir. It is submitted that there is nothing in the statutes to affect the lords' right to two fines. The 32nd section enables the Court of Chancery to make an order appointing a new trustee or trustees either in substitution for or in addition to any *existing* trustee or trustees.

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By s. 28, if the order is made with the consent of the lord, the lands are to vest, without any surrender or admittance, in the person so appointed: but the latter part of the section expressly saves the rights of the lord. So that, if the order had followed the precise terms of the Act, and had been for the substitution of the defendant for Peter James Paterson, in whom the legal estate as trustee was vested, the rights of the lord would have remained unaffected. On the disclaimer of the widow of Peter Paterson the elder, assuming it to be effectual (1), the lord had a right to call on Peter James Paterson to come in and be admitted; and then his right to two fines would have been indisputable: *Morse* v. *Faulkner* (2); *Reg.* v. *Dullingham* (3); *Lord Londesborough* v. *Foster*. (4) Without the aid of the statute, no one but Peter James Paterson, the customary heir, could have got on the roll without paying two fines: and the lord's rights are equally reserved under 15 & 16 Vict. c. 55, as under the former Act. Before the passing of 55 Geo. 3, c. 192, a previous surrender to the uses of a will of copyhold lands was necessary to make the disposition effectual; and, though that statute dispensed with the formality, it reserved the lord's fines. The 28th section of 13 & 14 Vict. c. 60 is not restricted to the case of a trustee appointed to convey. Under the Bankrupt Act of 13 Eliz. c. 7, it was held that an assignee under a commission of bankruptcy must surrender a copyhold to a purchaser, notwithstanding that the lord might exact two fines: *Drury* v. *Man*. (5) To avoid this, Lord Hardwicke recommends it to commissioners of bankrupts for the future to except copyholds out of the deed of assignment of the bankrupt's estate: and he intimates that it would be proper for the legislature to remedy this inconvenience. The recommendation of Lord Hardwicke was approved by Sir John Leach, V.C., in *Ex parte Harvey, In re Humphreys* (6), and sanctioned by legislative enactment in 5 Geo. 4, c. 98, s. 65, 6 Geo. 4, c. 16, s. 68, and 24 & 25 Vict. c. 134, s. 114. All these Acts, which are in pari materiâ,

(1) See *Townson* v. *Tickell*, 3 B. & A. 31; *Doe* d. *Chidgey* v. *Harris*, 16 M. & W. 517.

(2) 1 Anstr. 11.

(3) 8 Ad. & E. 858.

(4) 3 B. & S. 805; 32 L. J. (Q.B.) 225.

(5) 1 Atk. 95.

(6) Buck, B. C. 493.

shew that, unless taken away by express words, the right of the lord to two fines would remain.

[WILLES, J. It should rather seem that a statutory appointment places the appointee in the same situation as the person in substitution for whom he is appointed.]

Under the bankrupt law, the estate remains in the bankrupt until the order of the Court vests it in the purchaser. The two fines are only avoided by avoiding the intermediate assignment.

Joshua Williams, Q.C. (*J. O. Griffits* with him), for the defendant. The defendant claims under the order of the 30th of May, 1866, by which it is ordered that "Abraham Booth be appointed a trustee of the will of Peter Paterson the elder, in substitution for Peter Paterson the younger, deceased;" and that "the copyhold or customary hereditaments devised by the will of Peter Paterson the elder, and held of the manor of Woodford, do vest in Abraham Booth for the estate of the said Peter Paterson the younger, therein," &c. If Peter Paterson the younger had been admitted and had in his life-time surrendered to the defendant, the defendant would clearly have had to pay one fine only. Peter Paterson the younger was admitted and did pay a fine. The defendant, therefore, comes in directly under one who has paid a fine. In Watkins on Copyholds (by Coventry), vol. i. p. 128, it is said "Although the surrenderee has no estate in the premises till actual admission, yet such admission, on being actually made, shall relate to the surrender, and operate from its date. So soon as the surrender is made, so soon is the property bound: and from that time shall the estate be deemed in the surrenderee by relation, on the admission being actually made. Should the surrenderor die in the interim, i.e. between the surrender and admission, he would, indeed, die seised of the premises, yet it would not be of an absolute, but of a defeasible estate of inheritance; and consequently, though his heir would take by descent, and his widow be entitled to dower, yet, on the admission of the surrenderee, would such estate be defeated; and, of consequence, the descent and title to dower would be defeated also." The Trustee Act, 1850, gives the Court of Chancery power to make an order which is to have the same effect as if the

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deceased trustee had in his life-time made a surrender. This order was made under s. 32 of that Act, as extended by s. 9 of the Act of 1852: and it is to have the same effect as if Peter Paterson the younger had made a conveyance: 14 & 15 Vict. c. 60, ss. 13, 34. By the interpretation clause (s. 2) "lands" includes copyholds. By the order, the defendant is put in the place, not of the heir-at-law, but of Peter Paterson the younger, deceased. As to the doctrine of relation, the cases of *Holdfast* d. *Woollams* v. *Clapham* (1) and *Doe* d. *Bennington* v. *Hall* (2) may be referred to. The general scope and object of these Acts was, to provide a remedy for certain inconveniences; and while, on the one hand, the lord's rights are preserved, it was not intended to enable him to make a profit out of these transactions. The provisions in the Bankrupt Acts which were referred to were, in like manner, enacted for the purpose of preventing the lord from extorting two fines on a conveyance for the benefit of the creditors of a bankrupt. A similar order to this was made, as to leaseholds, in *Re Matthew's Settlement.* (3) The judgment of Lord Romilly, M.R., in *Paterson* v. *Paterson* (4) clearly shews that there has been but one devolution of title here.

Archibald was heard in reply.

BOVILL, C.J. The right of the lord in this case to any fine must be founded on the custom of the manor, or on some statute. If it rested upon custom of the manor, the short answer would be that the facts do not bring the case within the custom. The custom clearly does not entitle the lord to two fines. By custom the lord is entitled to a fine on the admittance of each tenant. In some cases, where the tenant has to make title through some person who has not been admitted, the rights of the lord are reserved. But, in this case, the admittance is not upon a surrender or according to the custom of the manor. The defendant cannot be said to claim in any sense through Peter James Paterson. The name of Peter James Paterson is not mentioned in the order: and the claim of the plaintiffs is founded upon the Act of Parliament and the order. The order substitutes the defendant as trustee in the place of Peter Paterson the younger, the deceased trustee, and the only person

(1) 1 T. R. 600.
(2) 16 East, 208.
(3) 2 W. R. 85.
(4) Law Rep. 2 Eq. 31. 35 Beav 555. 12 Jur NS 466

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who was the last trustee, in the sense of being the person admitted as such as tenant on the roll of the manor. The powers of the Court of Chancery to appoint new or substituted trustees under the Acts of 1850 and 1852 are very extensive. By s. 9 of the latter (15 & 16 Vict. c. 55), it is provided that, "in all cases where it shall be expedient to appoint a new trustee, and it shall be found inexpedient, difficult, or impracticable to do so without the assistance of the Court of Chancery, it shall be lawful for the said Court to make an order appointing a new trustee or new trustees, whether there be any existing trustee or not at the time of making such order:" and by s. 12 the two Acts are incorporated and to be construed together. The effect of an order of the Court of Chancery appointing a new trustee is described in s. 34 of 13 & 14 Vict. c. 60. That section enacts that "it shall be lawful for the said Court of Chancery, upon making any order for appointing a new trustee or new trustees, either by the same or by any subsequent order, to direct that any lands subject to the trust shall vest in the person or persons who upon the appointment shall be the trustee or trustees, for such estate as the Court shall direct; and such order shall have the same effect as if the person or persons who before such order were the trustee or trustees (if any) had duly executed all proper conveyances and assignments of such lands for such estate." The word "lands," by s. 2, embraces copyholds, and the words "conveyances and assignments" include surrender and admittance. The effect of these two sections, therefore, coupled with the order of the 30th of May, 1866, is, to vest the whole estate of Peter Paterson the younger in the defendant. Much argument has been addressed to us with reference to other sections of the Act of 1850. The whole scope of it is, to embrace every case of inconvenience that can possibly arise and call for a remedy. Thus, s. 5 provides for the case of a sole trustee becoming lunatic or of unsound mind; s. 7 for the case of infants; ss. 9, 10, 11, for the case of a sole trustee being out of the jurisdiction of the Court, or not to be found; s. 13 for the case of two trustees dying and it being uncertain which of them was the survivor; s. 15 for the case of a trustee dying without an heir; and s. 16 provides for the contingent rights of unborn persons. If nothing more had occurred, therefore, as regards the copyhold property, the order above

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referred to, without any admittance, would have vested it in the defendant, by force of the Act. The 28th section has been relied on to shew that in such a case as this admittance is necessary. It enacts that, "whensoever, under any of the provisions of this Act, an order shall be made by the Court of Chancery vesting any copyhold or customary lands in any person or persons, and such order shall be made *with the consent* of the lord or lady of the manor whereof such lands are holden, then the lands shall, without any surrender or admittance in respect thereof, vest accordingly; and whenever, under any of the provisions of this Act, an order shall be made by the Court of Chancery appointing any person or persons to convey or assign any copyhold or customary lands, it shall be lawful for such person or persons to do all acts and execute all instruments for the purpose of completing the assurance of such lands; and all such acts and instruments so done and executed shall have the same effect, and every lord and lady of a manor, and every other person, shall, *subject to the customs of the manor and the usual payments*, be equally bound and compellable to make admittance to such lands, and to do all other acts for the purpose of completing the assurance thereof, as if the person in whose place an appointment shall have been made, being free from any disability, had duly done and executed such acts and instruments." The inference sought to be drawn from that section is, that, where the lord does not consent to the appointment of the trustee by the Court, the trustee so appointed must take admittance. But it is to be observed that the section says nothing about any fine being due: and, had it not been for the implication arising from s. 28, I should have thought that, by force of the other sections I have referred to, the estate would have vested in the newly-appointed trustee without admittance. The admittance is to be of the person appointed by the Court of Chancery. Upon the admittance the lord may be entitled to a fine; and the defendant is willing to pay, and has actually paid or tendered, one fine. I can discover in the statutes no implication of a right in the lord to any other fine. Mr. Archibald contends that such an implication does arise from the latter part of s. 28 of the Act of 1850, which provides that the lord shall, "subject to the customs of the manor and the usual payments," be bound and compellable to make admittance

to such lands, &c. That part of the section, however, applies where the order is not a vesting order, but an order for another person to convey; which is not this case. That part of the section, therefore, clearly has no application here: and it is unnecessary to determine whether or not two fines would be payable under such circumstances. We are asked to hold that two fines are payable where the order is, as here, an order to vest the estate in the person appointed trustee. That construction, however, I conceive not to be warranted either by the letter or the spirit of the Act. The order is, that Booth be appointed a trustee of the will of Peter Paterson the elder, in substitution for Peter Paterson the younger, deceased, and that the copyhold hereditaments devised by the will of Peter Paterson the elder do vest in Booth for the estate of Peter Paterson the younger therein, to be held by Booth upon the existing trusts of the said will. There being nothing more in the Act than I have adverted to, and the case not being brought within any custom of the manor, there is nothing to warrant a claim by the lord of two fines. Much stress has been laid on the various Acts of Parliament dispensing with formal proceedings in the lord's court; as, for instance, the 55 Geo. 3, c. 192, which dispenses with a previous surrender to the uses of a will. But there it is expressly provided that the interests of the lord are not to be prejudiced by the absence of the intermediate surrender. With regard to the Bankrupt Acts, it is true that, under the earlier ones, the commissioners assigned copyholds of the bankrupt to the assignees, and the latter conveyed to a purchaser, and so two fines became payable to the lord: but that injustice was obviated by the adoption of the course recommended by Lord Hardwicke in *Drury* v. *Man* (1), and since in substance carried out in the later Acts. And I may observe that it has long been a custom or practice amongst conveyancers to give to trustees a mere power to sell in the case of copyholds, without giving them any estate therein. It is clear that, in the case of a transfer of the copyhold tenement to a purchaser under a bankruptcy, one fine only is payable. The transaction here seems to me to be very similar in substance. The order of the Court of Chancery operates as a statutory transfer; and, to render a fine payable, it would seem to me to require an

(1) 1 Atk. 95.

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express enactment. Independently of this general view of the construction of the Act, it seems to me that the order of the Lords Justices substantially disposes of the matter, and that that order is right both in substance and in form. The only person who appeared on the roll as trustee was Peter Paterson the younger, deceased. Peter James Paterson, though undoubtedly the customary heir, was never admitted tenant; and, Peter Paterson the younger having been admitted, it was perfectly competent and right for the Court of Chancery to direct, as they did, that Booth should be substituted as trustee for Peter Paterson the younger, and that the copyhold estate should vest in him as such trustee. If so, it seems to me that the case is precisely the same as if Peter Paterson the younger had made a conveyance to Booth, and Booth had been admitted tenant; in which case, it is clear that one fine only would have become payable by the latter to the lords. For these reasons, I am of opinion that the defendant is entitled to judgment.

WILLES, J. I am of the same opinion. Peter Paterson the younger, in whom the estate vested subject to certain trusts, was admitted as tenant on the roll, and paid a fine. He died; and I take it that the effect of his will was that his widow took as trustee, and might if she had so pleased have been admitted tenant of the copyholds in question. She, however, disclaimed the devise as to them, and, though only a partial disclaimer, inasmuch as it makes no difference in the result, I take it to have been effectual. Upon the widow's disclaimer, Peter James Paterson would, as customary heir, in the absence of any interference on the part of the Court of Chancery, have had a right to be admitted as tenant on the roll; and in that case he would have paid a fine to the lord. Upon the statements in the case, it must be assumed that Peter James Paterson never acted in the trust, except by the circumstance that he was the heir of an ancestor who had so acted. He was not in a situation to disclaim. He had the estate stamped with the trust: but he was not for any practicable purpose a trustee. No doubt, therefore, it was expedient that there should be a new trustee appointed in his place. There are none of the circumstances in this case which existed in *Re Blanchard* (1), where, a

(1) 3 De Gex, F. & J. 131; 30 L. J. (Ch.) 516.

trustee objecting to be removed, the Lords Justices declined to exercise the power vested in them by the Act of appointing a new or substituted trustee. I cannot, therefore, doubt (if it were proper to entertain a doubt upon the subject) that the Lords Justices had jurisdiction to make the order which they made in this case. The order was made under s. 32 of the Act of 1850, as explained and fortified by s. 9 of the amending Act of 1852. If, then, the Lords Justices had power to make this order vesting the lands in the defendant as trustee, what is its effect? To substitute him for the existing trustee or trustees. It may be taken either that the order was founded on the 9th section of the Act of 1852, which extends the former provision to the case where there is no trustee, and that the order places the defendant in a position which before was not occupied by any existing trustee; or it may be taken that it was founded on s. 32 of the Act of 1850, and that the defendant was appointed in substitution for one who, though a trustee in a certain sense, was for all practical purposes no trustee at all. If the order be dealt with in the former sense, it is clear that the defendant is substituted for the devisee under the will of Peter Paterson the younger, and is put in the place of that devisee. And if it be treated as an order under s. 32 of the Act of 1850, as an appointment of the defendant in substitution for one who has never dealt with the estate as trustee, I cannot for a moment doubt that the effect of it is to vest the copyholds in the defendant, in the same way as they would have vested in the person who was last willing and able to act in the trust, and consequently that the defendant was entitled to be admitted on payment of one fine only.

As to the section which directly affects copyholds,—s. 28,—it is enough to say that it does not contain any language calculated to sustain the lords' claim. Suffice it to say that this is not an order made with the consent of the lords, and therefore the case is not within the first part of the section. The latter part provides that the conveyance shall be made "subject to the custom of the manor and the usual payments." That reduces the question to, what is the custom of the manor? And that is, that one fine only is payable upon the descent of the copyhold to the customary heir, and, if the customary heir has not been admitted, the next person who

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claims to be admitted pays two fines; thus making the surrenderee of the customary heir take as a purchaser. That, however, does not apply to the case of one who claims by virtue of an order under the statute, and so is put in the place of the heir or devisee, and does not claim by transfer from the heir or devisee. In that case one fine only is payable.

KEATING, J. I am of the same opinion. I entertain no doubt that the Lords Justices had power under the statutes to make the order which they have made. That order is very express. It directs in precise terms the substitution of the present defendant as a trustee of the will of Peter Paterson the elder, for Peter Paterson the younger, deceased. Mr. Archibald contends, that, upon the true construction of the two Acts of 1850 and 1852, the defendant is to be considered as taking, not from Peter Paterson the younger, but from Peter James Paterson, who by the accident of the disclaimer by the devisee came upon the scene. It is true that Peter James Paterson was the customary heir; but he never in any way interfered in the trusts, and was not in any proper sense of the word a trustee. If so, I am at a loss to see any ground for claiming a second fine. Mr. Archibald says the defendant must deduce his title through Peter James Paterson, and so the lords' claim to a second fine arises. I do not think that was the intention of the Acts of Parliament. The Court of Chancery was to have power to substitute a new trustee; and the party so substituted was to have the same right to be admitted as he would if the tenant last on the roll had surrendered to him. Under these circumstances, the lords are only entitled to one fine.

BRETT, J. I think the Lords Justices clearly had power under s. 32 of the Act of 1850, and s. 9 of the Act of 1852, to make the order in the terms they did. If they had such power, then the order is express, that Booth is substituted as trustee for Peter Paterson the younger, and to hold the customary hereditaments in question for the estate of Peter Paterson the younger therein. If so, the case is not brought within the custom of the manor, because the defendant does not claim through the customary heir, but by

force of the statutes and of the order. I find nothing in the statutes to warrant the lords in claiming two fines under the circumstances of this case.

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Judgment for the defendant.

Attorneys for plaintiffs: *Coverdale & Co.*
Attorney for defendant: *Benjamin Bodman.*

END OF MICHAELMAS TERM, 1869.

CASES

DETERMINED BY THE

COURT OF COMMON PLEAS,

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF COMMON PLEAS,

IN AND AFTER

HILARY TERM, XXXIII VICTORIA.

1870
Jan. 13.

SMITH *v.* THE LONDON AND SOUTH WESTERN RAILWAY COMPANY.

Railway Company—Negligence—Fire from Engine.

7 C.P. 256
257

Workmen employed by a railway company in cutting the grass and trimming the hedges bordering the railway, placed the trimmings in heaps near the line, and allowed them to remain there fourteen days, during very hot weather in the month of August. Fire from a passing engine ignited one of these heaps, and burned the hedge, and was thence carried by a high wind across a stubble-field and a public road, and burned the goods of the plaintiff in a cottage about 200 yards distant from the railway:—

Held, by Bovill, C.J., and Keating, J. (Brett, J. dissenting), that there was evidence to go to the jury of negligence on the part of the defendants, although there was no suggestion that the engine was improperly constructed or driven.

Affd in Exch 6 C.P. 14

THE first count of the declaration stated that, at the time, &c. the plaintiff was possessed of a cottage and premises, and the defendants were possessed of and had the care and management of a railway running near the said cottage and premises, with banks belonging to and part of the railway; and the defendants were possessed of a locomotive engine containing burning substances, which

was being driven along the railway near to the said cottage and premises under the management of the defendants; yet by and through the negligence of the defendants in that behalf, and their omission to use proper precautions against the dangerous escape of sparks, cinders, or other burning substances from the chimney or ash-box of the said engine, or otherwise from the said engine, while the said engine was being so driven along the railway near to the said cottage and premises, sparks, cinders, or other burning substances escaped and flew from the said engine, and thereby a fire was caused, and the same spread to the plaintiff's cottage and premises, and thereby the same and the plaintiff's furniture, &c. therein were burnt, &c.

The second count charged the negligence as follows:—Yet by the negligence and improper conduct of the defendants, and the want of due care on the part of the defendants in the keeping and management of their railway, engines, and banks, quantities of cut grass and hedge-trimmings were heaped up on the said railway and banks, and became ignited, and a fire was occasioned which spread over and along a stubble-field near the said railway unto the said cottage and premises, and set fire to the same, and caused the like loss and injury to the plaintiff as was stated in the first count.

The third count stated that the plaintiff was possessed of a cottage and premises, and the defendants were possessed and had the care and management of a railway running near the cottage and premises, with banks belonging to the railway and part thereof; yet the defendants, by their servants, so negligently and improperly burnt things, to wit, cut grass and hedge-trimmings, on the said railway and banks, that by their negligence in lighting or in keeping the said fire, the same extended to and set fire to a hedge and the stubble in a field near the said railway, and such fire extended to the plaintiff's cottage and premises and set fire to the same, and caused the like damage to the plaintiff as is described in the first count.

Plea: Not guilty. Issue thereon.

The action was commenced in the county court at Wareham, but was removed by certiorari, at the instance of the defendants, into this court. The plaintiff sought to recover 30*l.* for damage

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done to his furniture and goods in a cottage at Binnegar, in the parish of East Stoke, near a line of the defendants' railway from Wareham to Dorchester.

The cause was tried before Keating, J., at the last Dorset summer assizes, when it appeared, that about fourteen days previous to the 3rd of August, 1868, the defendants' servants, after cutting the grass and trimming the banks and hedges at the sides of the line, had raked the cut grass and hedge-trimmings into heaps near the line and there left them, and that owing to the extreme heat of the weather these heaps had become very dry and inflammable. On the 3rd of August, at about 1 P.M., two trains (an up train and a down train) belonging to the defendants, passed the spot in question, and immediately afterwards the heaps were on fire; and, in consequence of a high wind prevailing at the time, the fire consumed the adjoining hedge, and, notwithstanding the utmost efforts of the company's servants and others to subdue it, passed over a stubble-field and a public road, and communicated to the plaintiff's cottage, which was about 200 yards from the line, and destroyed it with the furniture therein. One of the witnesses for the plaintiff stated that at the time referred to there were fires all about the country; but whether he meant on the sides of the railway or not, did not clearly appear. There was no evidence to shew that the company's engines were improperly constructed, or that they were negligently or improperly worked.

On the part of the plaintiff it was contended that there was evidence from which the jury might fairly assume that the fire was caused by sparks or burning cinders from one of the engines which had just before passed the spot; and that there was negligence on the part of the company's servants in allowing such inflammable material to remain on the banks of their railway for so long a time in so dry a season, and therefore they were responsible for the damage resulting from it.

For the defendants it was contended, on the authority of *Vaughan* v. *Taff Vale Ry. Co.* (1), that the defendants were not responsible for damage resulting from the cause suggested, in the absence of evidence to shew that their engines were improperly constructed

(1) 3 H. & N. 743; 28 L. J. (Ex.) 41: in error, 5 H. & N. 679; 29 L. J. (Ex.) 247. 4 Jur. N.S. 1302. 6 Jur. N.S. 899

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or had been negligently or improperly worked; and that there was no evidence of negligence to go to the jury.

The learned judge declined to nonsuit; and a verdict was found for the plaintiff for the sum claimed, leave being reserved to the defendants to move to enter verdict for them, or a nonsuit, if the Court should be of opinion that there was no evidence of negligence which ought to have been submitted to the jury,—the Court to be at liberty to draw inferences, and to amend the pleadings.

Kingdon, Q.C., in Michaelmas Term last, obtained a rule nisi.

T. H. Cole, Q.C., and *Montagu Bere, Q.C.*, shewed cause. There was abundant evidence of negligence to go to the jury, notwithstanding there was no proof that the engines of the company were improperly constructed, or carelessly or improperly worked. The circumstances plainly shewed that the fire had its origin in sparks or burning cinders from one or other of the two engines which passed along the line just before it broke out. The fair result of the authorities referred to in Addison on Torts, 2nd ed. 209, 210, and particularly the case of *Vaughan* v. *Taff Vale Ry. Co.* (1), as corrected by the Exchequer Chamber (2), is, that although a railway company authorized by the legislature to use locomotive engines, is not responsible for damage from fire occasioned by sparks emitted from an engine travelling on their railway, provided they have taken every precaution in their power and adopted every means which science can suggest to prevent injury from fire, and are not guilty of negligence in the management of the engine; yet, if there be evidence that the company's servants have acted negligently and so caused the damage, the company will be responsible. Here the defendants were guilty of negligence in leaving the trimmings on the sides of the line for so long a period as fourteen days, in such unusually dry weather; and the evidence clearly shewed that this negligence was the immediate cause of the damage to the plaintiff. And, if there was *any* evidence to go to the jury, the verdict cannot be disturbed. It is enough on these occasions to shew a primâ facie case of negligence: *Byrne* v. *Boadle.* (3)

(1) 3 H. & N. 743; 28 L. J. (Ex.) 41.
(2) 5 H. & N. 679; 29 L. J. (Ex.) 247.
(3) 2 H. & C. 722; 33 L. J. (Ex.) 13.

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Kingdon, Q.C., Lopes, Q.C., and *Murch,* in support of the rule. There was no evidence of negligence to go to the jury. The defendants' servants cut the grass and trimmed the hedges at the sides of the railway in the ordinary course of their duty; and, but for the great heat of the weather and the high wind at the time,—a combination of circumstances for which the defendants are not responsible,—the fire would not have reached the hedge and travelled across the stubble-field, and thence to the cottage occupied by the plaintiff. This was a result which no reasonable person could have anticipated. To warrant the learned judge in leaving the case to the jury, it was not enough for the plaintiff to shew a state of facts which might be equally consistent with negligence or the absence of it. (1) *Blyth* v. *Birmingham Waterworks Company* (2), is very much in point. It was there held that a water company, who had observed the directions of their Act of Parliament in laying down their pipes, were not rendered liable for injury resulting from water escaping from them, by the mere fact of the precautions taken by the company against the effects of a winter of extreme coldness, such as no human being could have foreseen, proving insufficient.

BRETT, J. I am of opinion that there was no evidence to go to the jury of negligence on the part of the defendants. I cannot help feeling that great difficulty is thrown upon the judges who are called upon to determine questions of this sort, which make them too much judges of facts. I take the rule of law in these cases to be that which is laid down by Alderson, B., in *Blyth* v. *Birmingham Waterworks Company*: (3) "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. The defendants might have been liable for negligence, if, unintentionally, they omitted to do that which a reasonable person would have done, or did that which a person taking reasonable precautions would not have done. A

(1) See *Toomey* v. *London and Brighton Railway Company*, 3 C. B. (N. S.) 146; 27 L. J. (C.P.) 39; *Cotton* v. *Wood*, 8 C. B. (N. S.) 568; 29 L. J. (C.P.) 333.

(2) 11 Ex. 781; 25 L. J. (Ex.) 212.

(3) 11 Ex. at p. 784; 25 L. J. (Ex.) at p. 213.

2 Jur. N.S. 384

(1) 8 C. 2 Jur. N.S. 333.

reasonable man would act with reference to average circumstances in ordinary years." That being the rule, the question here is whether the defendants by their servants have done or omitted to do something which reasonable men placed under such circumstances as they were placed in would have done or omitted to do. The case of the plaintiff, as put by Mr. Cole on moving, and also in his argument to-day, is this:—Conceding that there is no ground for saying that the defendants' engines were not of the best possible construction, or that there was negligence in the mode of working them, they were bound to take notice that such engines do emit sparks and burning cinders; and, as they were driving them through the country in an exceptionally dry season, they ought not to have permitted such combustible materials as rummage or hedge-trimmings to remain on the banks of their railway; they ought, as reasonable men, to have contemplated that sparks from their engines might set them on fire, and that, if they did, the fire might extend to the plaintiff's property. I quite agree that the defendants ought to have anticipated that sparks might be emitted from their engines, notwithstanding they are of the best construction, and were worked without negligence; and that they might reasonably have anticipated that the rummage and hedge-trimmings allowed to accumulate might be thereby set on fire. But I am of opinion that no reasonable man could have foreseen that the fire would consume the hedge and pass across a stubble-field, and so get to the plaintiff's cottage at the distance of 200 yards from the railway, crossing a road in its passage. It seems to me that no duty was cast upon the defendants, in relation to the plaintiff's property, because it was not shewn that that property was of such a nature and so situate that the defendants ought to have known that by permitting the rummage and hedge-trimmings to remain on the banks of the railway they placed it in undue peril. If that had been shewn, I should have thought that the case fell within the principle laid down by Cockburn, C.J., in *Vaughan* v. *Taff Vale Ry. Co.* (1), for then the defendants must have been taken to have known that the course which was pursued by their servants was calculated to endanger the adjoining property. But, bringing one's knowledge of ordinary English country

(1) 5 H. & N. 679, 685; 29 L. J. (Ex.) 247.

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life to bear upon the subject, I am of opinion, as matter of fact, that no reasonable man could suppose,—or at least eight out of ten would fail to suppose,—that, if by any means the rummage and hedge-trimmings on the side of the railway were set on fire, the fire would extend to a stubble-field adjoining, and so proceed to a cottage at the distance before mentioned. We read of such fires in the American prairies; but it would never occur, as it seems to me, to the mind of the most prudent person that such an extraordinary conflagration could be caused in this country in the manner here spoken to by the witnesses. I think the defendants cannot reasonably be held responsible for not having contemplated such an extraordinary combination of circumstances, or such a result. For these reasons I am of opinion that there was no such evidence of negligence on their part as could properly be left to the jury.

KEATING, J. Agreeing as I do with my Brother Brett as to the difficulty in which the judges are placed when called upon to deal with questions of this sort, I yet come to a different conclusion from that at which he has arrived. It seems to me that there was evidence here which could not properly be withheld from the jury. The broad facts, upon which there appears to be no dispute, are in substance these:—At a quarter before one o'clock of the day in question things were all safe; and some time between that and one o'clock the fire was discovered on the line. The last thing noticed was that some plate-layers in the company's employ were eating their dinners near the spot, and that an up-train and a down-train had just passed when the fire was seen to break out with great violence. The company's servants had been employed in cutting the grass on the banks of the railway and trimming the hedges. The rummage, as it is called, and the hedge-trimmings, had been collected in heaps, either for the purpose of burning it or carrying it away; and these heaps had been allowed to remain at the side of the line for about fourteen days. Under ordinary circumstances, perhaps, it could hardly be said that this was an improper thing to do, or that fourteen days was an unreasonable time to allow the heaps to remain there. It is clear that the fire first broke out on the line, and that it broke out with such violence that the company's servants present at the spot were unable to

extinguish it. There was some evidence that one of the men went for a bucket; and there was positive evidence that the company's servants made strenuous but unavailing efforts to extinguish the conflagration. I therefore think it may be fairly inferred that the fire broke out under circumstances which shewed that the materials it fed upon were in a highly combustible state. The fire extended up the bank of the railway, through the hedge, and across a stubble-field, and so to the plaintiff's cottage. Undoubtedly at that time there seems to have been a very high wind; and that would give a force to the fire which under ordinary circumstances it would not have had. But that which presses upon my mind is, that it is impossible to say that the accumulation of such materials at such a season of the year, and permitting them to remain there so long, was not some evidence of negligence. It was proved that the weather was unusually dry, and that fires were occurring all about the country, though it was not expressly stated that these were on the line. Under these circumstances, I cannot help thinking that the allowing the accumulation of such materials so near to where trains were constantly passing was evidence of negligence. Feeling the full force of my Brother Brett's remarks, I still think the whole facts were proper for the consideration of the jury, and that the evidence was such as could not and ought not to have been withheld from them. I therefore think the rule for entering a nonsuit should be discharged.

BOVILL, C.J. If the Court had to decide this matter between the plaintiff and the defendants, I should probably have entertained some doubt upon this evidence as to what ought to be the result. But we are not placed in that difficulty here, because the sole question we have to consider is, whether there was any evidence of negligence on the part of the defendants which was proper to be submitted to the jury. I am of opinion that there was such evidence. In the first place, there was abundant evidence to shew that the fire was caused by sparks or cinders emitted from one of the two engines belonging to the company which passed the spot immediately before the fire broke out. I agree that the mere circumstance of the fire being caused by an engine of the company, is not enough to give a cause of action against them; but the

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plaintiff must shew some breach of duty on their part which occasioned the injury he complains of. The legislature has thought fit to authorize the employment of locomotive engines, which emit sparks and cinders more or less according to their construction and the speed at which they are driven: and in that respect the case differs materially from *Bligh* v. *Birmingham Waterworks Company.* (1) In that case the defendants were held not to be responsible for damage caused by the bursting of their pipes through extreme frost. The company there had no means of protecting their pipes from the unusual severity of the weather. Here, however, the company have control over their engines, and may so regulate their power and the speed at which they run as very materially to diminish the danger which may naturally be expected to result from their use. There was, it is true, no evidence here that the engines were of an improper or unusual construction, or that they were being driven in a careless or improper manner. We must, therefore, look at all the circumstances occurring at the time of the accident, to see if there is anything upon which to found a charge of negligence. At the time this fire occurred, the weather was and had been for a considerable period unusually dry. The company's servants had been employed in cutting the grass and trimming the hedges at the sides of the line, and had heaped together the cuttings either for the purpose of burning or carrying them away, and had allowed them to remain in that state for about a fortnight. Under ordinary circumstances, it may be that hedges are not expected to ignite; but, if there be collections of grass and hedge-trimmings near them in a very dry and inflammable condition, and these by some means become ignited, it may fairly be presumed that the hedges will be in danger: and who is to say where the danger will stop? It is said that no reasonable man could have supposed that, even if the fire did communicate to the hedge, it would run across a stubble-field and a public road, and so reach a building at the distance of 200 yards from the railway. But, seeing that the defendants were using dangerous machines, that they allowed the cuttings and trimmings to remain on the banks of their railway, in a season of unusual heat and dryness, and for a time which, under these circumstances, might be fairly called unrea-

(1) 11 Ex. 781; 25 L. J. (Ex.) 212.

sonable, and that there was evidence from which it might reasonably be presumed that their engines caused the ignition of these combustible materials, and that the fire did in fact extend to the cottage, I think it is impossible to say that there was not evidence from which a jury might be justified in concluding that there was negligence as regards the plaintiff, and that the destruction of the cottage in which the plaintiff's goods were was the natural consequence of their negligence. What the defendants' servants ought, as reasonable men, to have contemplated as the result of leaving the accumulations of cuttings and trimmings where and as they did, must depend upon all the circumstances. It is not, however, for us to decide whether the injury complained of was a probable consequence of the conduct of the defendants' servants. It is enough for us to say that there was evidence for the jury: and, they having found for the plaintiff, we cannot interfere.

Rule discharged.

Attorneys for plaintiff: *Sole, Turner, & Turner, for W. C. Lacey, Wareham.*

Attorney for defendants: *Lewis Crombie.*

THE DERBY COMMERCIAL BANK (LIMITED) *v.* LUMSDEN AND ANOTHER.

Jan. 15.

Practice—Interrogatories under s. 51 *of the Common Law Procedure Act,* 1854, 17 *&* 18 *Vict. c.* 125.

Barley was consigned by A. to B., and was delivered by the ship-owners to B. without production of the bill of lading. The plaintiffs (who were B.'s bankers), as indorsees of the bill of lading from him, three months afterwards (B. having in the meantime become bankrupt) brought trover against the ship-owners. Upon an affidavit suggesting that the bill of lading was indorsed to the plaintiffs after the delivery of the barley to B., or that they, having the bill of lading in their possession, knowingly suffered the ship-owners to deliver the barley to B.,—

The Court allowed interrogatories under s. 51 of the Common Law Procedure Act, 1854, to be administered to the plaintiffs as to the time when and the circumstances under which the indorsement of the bill of lading to them took place.

Finney v. *Forwood* (Law Rep. 1 Ex. 6) distinguished.

TROVER for barley.

Pleas: Not guilty; and not possessed. In March, 1869, the barley

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in question was shipped on board the steamer *Panther*, of which the defendants were the managing owners, by one Heinemann, of Hamburg, whose agent in Hull was a Mr. Stephenson. The barley was sold by Heinemann, through Stephenson, to Messrs. Dawber & Gentel, of Lincoln; and, upon the arrival of the *Panther* in Hull, on the 19th of March, was delivered from the ship to Stephenson's order. Steamers from Hamburg often arrive in Hull before the bills of lading; and on this occasion, as had occurred on previous occasions, the barley was delivered to Stephenson, to be forwarded to Dawber & Gentel, upon a representation by Stephenson that they had bought it and were the consignees of the bill of lading. Dawber & Gentel having failed, the plaintiffs, who were the bankers of Dawber & Gentel, in June claimed the barley as indorsees of the bill of lading.

Upon an affidavit of these facts, and that the deponent had reason to believe that the plaintiffs knew or had the means of knowing that the barley had been delivered before they made any claim on the defendants in respect of it, application was made to a judge at chambers for leave to administer to the plaintiffs the following interrogatories, under s. 51 of the Common Law Procedure Act, 1854:—

"1. When first, and under what circumstances, did the bill of lading for the barley the subject of this action come to your hands, and how was it then indorsed?

"2. Did you then make, or have you since the bill of lading first came to your hands, made or caused to be made any inquiries as to the arrival of the ship or the goods mentioned therein? If yea, state when and through whom.

"3. Was the bill of lading indorsed by Messrs. Dawber & Gentel when it first came to your hands? If not, when first and by whom was that indorsement put on, and what passed on the indorsement being obtained?

"4. What, if any, advance did you make when the bill of lading came to your hands, and to whom and on whose behalf? On whose behalf did you then and have you since continued to hold the said bill of lading, and by way of security for what, if any, sum or sums of money?

"5. Were not you at the time the said bill of lading came to your hands, and until the end of June following, the bankers of Messrs. Dawber & Gentel? And what payments were made to you by them or on their behalf during that period?

"6. Did not Messrs. Dawber & Gentel, or either and which of them, frequently come to the bank on business during that period, and did not you know, or had you not reason to suppose before the 20th of June, 1869, that delivery of the said barley had been made to the said firm, or to some one acting for them or on their behalf, on or soon after the arrival of the barley?

"7. Did Messrs. Dawber & Gentel, or either and which of them, some time in April, May, or June, 1869, deposit with you, or place in your hands, or in the hands of any one for you or on your behalf, a quantity of barley, or documents representing barley, similar to that which is the subject of this action, or some barley or documents representing some barley? And, if so, for what purpose and on what terms?

"8. When did you first intimate to the said Messrs. Dawber & Gentel, or either of them, that a claim was about to be made on the defendants in respect of the barley the subject of the present action? And what passed on the subject?

"9. When did you first know that Messrs. Dawber & Gentel were insolvent or unable to meet their engagements?

"10. Have you at any time, and when, accepted any and what bill or bills of exchange, either through yourselves or your London agents, on behalf of Messrs. Dawber & Gentel, receiving at the time the bills of lading against which such bills were drawn; and have you always received the goods represented by such bills of lading? And, if not, state when and in what instance you have not received such goods.

"11. Have you received or written any and what letters to Messrs. Dawber & Gentel, or either of them, or to any person or persons (other than your attorney) relative to the barley the subject of this action? If yea, give the dates and particulars thereof."

Mellor, J., made the following indorsement on the summons:—"Referred to Court whether interrogatories should be allowed on

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behalf of defendants: if rule absolute, interrogatories to be settled at chambers; cause to be shewn in the first instance; costs to be costs in the cause."

Crompton Hutton moved accordingly. The learned judge at chambers referred the matter to the Court, in deference to the authority of *Finney* v. *Forwood*. (1) That case, however, proceeded on this, that the defendant there laid no ground for the interrogatories asked for. Here, the lapse of time since the delivery of the barley to Dawber & Gentel raises a strong presumption that the plaintiffs, even though they held the bill of lading, intended that the barley should be delivered to them. It is enough to suggest a reasonable case for discovery.

A. L. Smith shewed cause. This is an attempt to compel the plaintiffs to disclose their case, which is never allowed. In *Finney* v. *Forwood* (1), in trover for cotton, the Court of Exchequer refused to allow the defendant to interrogate the plaintiff as to how and when he first became possessed of the cotton, and when and in whose hands it was when he first became possessed of it; or as to his dealings with the person from whom the defendant had obtained the cotton. Here, as there, the defendants are contesting the plaintiffs' title to the goods.

[BOVILL, C.J. The ground upon which the decision in the case referred to proceeded, was, that the defendant laid no ground for the discovery he sought. Here, however, the defendants admit that the plaintiffs have a primâ facie case under a bill of lading properly indorsed, and a primâ facie liability by their negligent delivery of the barley to Stephenson without receiving the bill of lading. They seek to invalidate the plaintiffs' claim by shewing that a fraud has been practised upon them, and shewing some connivance or complicity of the plaintiffs with the persons who committed the fraud. They are seeking the means of proving their own case, not to inquire into that of the plaintiffs.]

Such interrogatories as these have never been allowed.

BOVILL, C.J. I am of opinion that these interrogatories (subject to the arrangement made at chambers) should be allowed. The

(1) Law Rep. 1 Ex. 6.

defendants admit a primâ facie case on the part of the plaintiffs. They seek to interrogate the plaintiffs as to matters which may shew a defence to the action, by shewing that a fraud has been committed upon them under circumstances which may preclude the plaintiffs from relying upon their primâ facie case on the bill of lading. *Finney* v. *Forwood* (1) shews that a mere suggestion of fraud will not suffice, but that the defendants must go further and shew something which raises a foundation for the charge of fraud, or something to connect the plaintiffs with that fraud. What was wanting in that case is found here. The plaintiffs are connected with Heinemann, the shipper of the barley, claiming under a bill of lading indorsed by him to Dawber & Gentel, and by Dawber & Gentel to them. The barley got into the hands of Dawber & Gentel, without the production of the bill of lading, upon a representation that they were entitled to have delivery of it. When we see clearly that the defendants have been defrauded by somebody, justice requires that they should be allowed to interrogate the plaintiffs, with a view, if possible, of establishing a defence to the action. I think the rule should be made absolute.

MONTAGUE SMITH, J. I am of the same opinion. I think this is eminently a case for interrogatories. The plaintiffs sue as holders of the bill of lading for certain barley which they allege the defendants to have wrongfully delivered to Dawber & Gentel. The defendants in their affidavit do not deny that the bill of lading was indorsed to the plaintiffs by Dawber & Gentel. There is fair ground for inferring that the plaintiffs received the bills of lading as Dawber & Gentel's bankers. The defendants suggest either that the plaintiffs, being the holders of the bill of lading, allowed Dawber & Gentel to receive the barley, or that Dawber & Gentel kept back the bill of lading and indorsed it to the bank after they had received the barley. It may turn out that there is no ground for either of these suggestions. That can only be ascertained by interrogating the plaintiffs, who best know the facts. It would be clearly against equity and good conscience that the plaintiffs should be allowed to succeed upon their primâ facie title, and the defendants be shut out from their defence. The plaintiffs ought to

(1) Law Rep. 1 Ex. 6.

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be interrogated as to the communications which passed between them and their customers with reference to the transaction in question. There can be no doubt that, if a bill were filed against them, they would be bound to answer; and we must give the same relief that a Court of Equity would do. I think my Brother Mellor's doubt was well founded.

BRETT, J. Now that the facts are ascertained, I think these interrogatories ought to be allowed. Mr. Smith hardly denied that, if the primâ facie case of the plaintiffs was admitted, it would be right that they should be interrogated. The plaintiffs, as indorsees of a bill of lading, sue the ship-owners for misdelivery of the goods. Their case is, that the bill of lading was indorsed by Heinemann, the shipper, to Dawber & Gentel, and by Dawber & Gentel to them. That makes a primâ facie case. The defence intended to be set up is, that the bill of lading was not indorsed to the plaintiffs at the time the goods were delivered to the consignees, or, if it was then indorsed, that the plaintiffs knew that the goods had been delivered, and made no objection until three months afterwards. I think the defendants are entitled to interrogate the plaintiffs in order to ascertain these facts.

Rule absolute.

Attorney for plaintiffs: *F. C. Greenfield.*
Attorneys for defendants: *Chester & Urquhart.*

SYKES AND OTHERS *v.* SYKES AND ANOTHER. 1870
Feb. 7.

Executor de son tort—Agent of Rightful Executor.

A person who deals with the goods of a testator, as agent of the executor, cannot be treated as executor de son tort whether the will has been proved or not. *Sharland* v. *Mildon* (5 Hare, 469; 15 L. J. (Ch.) 434) explained.

ACTION by Albert Sykes and Hannah Shaw, as executor and executrix of Ellen Sykes, deceased, and William Shaw, the husband of Hannah, who was joined for conformity, against Sir Tatton Sykes, the sheriff of Yorkshire, and James Love, an execution creditor, for the wrongful seizure, under a writ of fi. fa., of goods which had belonged to Ellen Sykes, and were at the time of the seizure in the possession of William Shaw.

The declaration was in trespass and trover. The defendants severed in pleading; and Sir Tatton Sykes, for a fifth plea, justified under a writ of fi. fa., by which he was directed to seize the goods of Ellen Sykes, deceased, in the hands of William Shaw, executor, to be administered.

The case was tried before Cleasby, B., at the last summer assizes for Yorkshire, when it was proved that the testatrix had been the owner of some chemical works, and that William Shaw had been her manager. By her will she appointed Albert Sykes and Hannah Shaw, her executor and executrix, and they on her death, without proving the will, directed William Shaw to continue to manage the works. The defendant Love having obtained judgment against William Shaw as executor of Ellen Sykes, issued a writ of fi. fa. against the goods of Ellen Sykes in the hands of William Shaw to be administered, and the sheriff seized the fixtures and other property upon the chemical works, the property of the testatrix. The plaintiffs, Albert Sykes and Hannah Shaw, subsequently, but before the commencement of the present action, proved the will of Ellen Sykes.

The jury found that the goods were, at the time of the seizure, in the possession of William Shaw, as agent for Albert Sykes and Hannah Shaw, and a verdict was entered for the plaintiffs against the sheriff for 100*l.*, and a verdict for the defendant Love, with

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leave to the sheriff to move to enter a nonsuit on the ground that the sheriff was justified under the fi. fa. in seizing the goods in question.

Field, Q.C., having obtained a rule accordingly,

Kemplay shewed cause. If the sheriff was justified in seizing these goods, it must have been on the ground that William Shaw might be treated as executor de son tort. The definition of an executor de son tort is given in Williams on Executors, 6th ed. vol. i. p. 247, note (a.), viz.:—"He who takes upon himself the office of executor by intrusion, not being so constituted by the deceased, nor for want of such constitution substituted by the (Ecclesiastical) Court to administer." Here William Shaw did not intrude into the office of executor, but acted under the authority of the rightful executors, who had clearly power to authorize him to do so, even without taking out probate. Executors may do almost all the acts which are incident to their office, and may even sell the goods of the testator before proving the will: Williams on Executors, 6th ed. p. 291. They derive their authority from the will and not from the probate, and are altogether in a different situation from administrators, who derive their authority from the Court, and who can do nothing, therefore, before their appointment: this distinction is pointed out clearly in *Middleton's Case.* (1) *Paull* v. *Simpson* (2) shews that a person who receives goods of a deceased person from an executor de son tort, does not thereby become an executor de son tort himself; and still less can a man be charged as such who receives goods, as in this case, from the rightful executors. There are two or three cases which will be relied on upon the other side, but they are either distinguishable from the present case or are in the plaintiff's favour. In *Hooper* v. *Summersett* (3), where the facts resembled those of this case, the ground of the decision was that the defendant, who carried on the trade of a deceased testator, was not the servant of the executrix, who was the defendant's wife, and who proved the will after the action was commenced. In this case, the jury have expressly found that William Shaw was the agent of his wife and Albert Sykes. In *Webster* v. *Webster* (4),

(1) 5 Rep. 28, b.
(2) 9 Q. B. 365.
(3) Wightw. 16.
(4) 10 Ves. 93.

the decision was only that a rightful executor can be sued before probate if he intermeddles with the goods; but it does not follow that his intermeddling is tortious. In *Sharland* v. *Mildon* (1), which was a suit against the agent of a testator's widow as executor de son tort, it does not appear clearly whether the widow was appointed executrix (2); if she was so appointed, the judgment is not supported by any of the cases upon which it professes to have proceeded. In *Padget* v. *Priest* (3) there was an intestacy, and the person charged as executor de son tort had received no authority to take possession of the goods of the deceased; and in *Cottle* v. *Aldrich* (4), the question left to the jury, and which was not objected to by the Court, was whether the defendant had voluntarily interfered without authority, or had acted as the agent of the rightful executor, who had not proved the will.

In *Hall* v. *Curtis* (5) the present Lord Chancellor says: "The case of *Sharland* v. *Mildon* (1) shews that if before administration is taken out an agent is employed, the agency is not lawful, so long as the employer is a wrongdoer. But if the employer becomes administratrix then all she has done is made right, and all that her agent has done is made right also," which shews that at any rate the subsequent proving of the will by the plaintiffs will relate back and render their acts lawful.

Field, Q.C., and *Forbes*, in support of the rule. There was sufficient dealing with the goods by William Shaw to make him liable as executor de son tort, unless that effect is prevented by his having had the authority of the executors. Those executors, however, had not proved the will or done any patent act which would shew the creditors they were executors; and unless, there-

(1) 5 Hare, 469; 15 L. J. (Ch.) 434.

(2) From an examination of the papers in this case through the kindness of Messrs. Langley and Gibbon, the plaintiffs' solicitors, it appears that the widow was not appointed executrix by the testator in either of the two wills left by him. By the first will the testator appointed his son, George Thomas Sharland, residuary legatee and sole executor; the rights under this will were finally compromised. By his second will the testator appointed his daughter, Georgiana Augusta Sharland, residuary legatee and sole executrix. Probate was granted on the 14th of May, 1845, of the second will, so far as related to the personal estate of the testator, to Robert Mildon, during the minority of G. A. Sharland.

(3) 2 T. R. 97.

(4) 4 M. & S. 175.

(5) Law Rep. 1 Eq. 90, 100.

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fore, the creditors were entitled to proceed against any person who was actually in possession of the goods of the testatrix, they were without remedy. The case of *Webster* v. *Webster* (1) is a distinct authority that if the executors named in a will intermeddle with the goods of the deceased before taking out probate they can be sued as executors de son tort, and it follows that their agents can also be so sued. This was expressly held in *Sharland* v. *Mildon* (2), if, as appears from the report in the *Law Journal*, the widow of the testator was named executrix in his will. (3) In *Hooper* v. *Summersett* (4) the contention on the part of the plaintiff was, that the probate related back, and prevented the husband of the executrix being a tort feasor, but the Court held that it did not so relate back, and Macdonald, C.B., said, "With regard to the probate, the only way that the creditors have of knowing who is the executor, is from the probate; and if they find the defendant acting as executor before the probate, and bring their action against him, the probate will not relate back so as to abate the suit."

BOVILL, C.J. The judgment in the original action by Love was against Shaw, as executor of Ellen Sykes, and the writ authorized the plaintiff to seize the goods of Ellen Sykes, in the hands of Shaw, as such executor, to be administered; the question in this case is, whether the goods actually seized were in the hands of Shaw to be administered by him. The question left to the jury was, in substance, whether the goods were in Shaw's hands as executor de son tort, or as agent of the executors named in the will; the jury found that the goods were in his hands as agent of the rightful executors, the present plaintiffs, and their finding on that point we must take as conclusive. I think that this was the right question to leave to the jury, and it was almost in the same terms as that left to the jury in the case of *Cottle* v. *Aldrich*. (5) Notwithstanding the finding of the jury it has been contended that, in point of law, Shaw, having interfered with the goods of the testatrix before probate, was an executor de son tort, and chargeable as such. If he had been acting in his own right the circumstances would

(1) 10 Ves. 93.
(2) 5 Hare, 469; 15 L. J. (Ch.) 434.
(3) See ante, p. 115, note (2).
(4) Wightw. 16, 21.
(5) 4 M. & S. 175.

have made him an executor de son tort, but in point of fact he was acting as the agent of the rightful executors. Are they, then, to be considered as wrongdoers? That depends, in some degree, on the authority possessed by executors before probate. They derive their title from the will, and they can do almost any acts incident to their office, and can commence actions without proving the will; they certainly would have been entitled themselves to have dealt with the goods in the way in which they were dealt with by Shaw, as their agent; it seems to me, therefore, that the acts of Shaw were legal, and did not constitute him executor de son tort. It is true that executors may be sued as executors by reason of their intermeddling with the goods of their testator before probate, and an executor so circumstanced appears in the case of *Webster* v. *Webster* (1) to have been called an executor de son tort; but this cannot have been intended to imply that he was a wrongdoer. It is clear that a person acting for an executor who has proved the will cannot be treated as executor de son tort, and several cases shew that the same is the case if he has not proved the will. This seems to have been assumed in *Hooper* v. *Summersett* (2) and *Cottle* v. *Aldrich.* (3) In the case of an intestacy, if a person who is subsequently appointed administrator intermeddles with the goods before obtaining letters of administration, according to *Padget* v. *Priest* (4) both he and any agent employed by him may be treated as executors de son tort; but even this appears from *Hill* v. *Curtis* (5) to be subject to some limitation. The case of *Sharland* v. *Mildon* (6) has been especially pressed on us; the facts of that case do not very distinctly appear (7), but it is clear that the widow was there treated as a wrongdoer; and if the executors here could be considered as wrongdoers their agent might, no doubt, have been treated as an executor de son tort; but I think that neither he nor they were wrongdoers in this case. On the whole, therefore, I am of opinion that the goods now in question were not in the hands of Shaw to be administered, and that the sheriff was not justified under the writ in seizing them.

(1) 10 Ves. 93.
(2) Wightw. 16.
(3) 4 M. & S. 175.
(4) 2 T. R. 97.
(5) Law Rep. 1 Eq. 90.
(6) 5 Hare, 469; 15 L. J. (Ch.) 434.
(7) See ante, p. 115, note (2).

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MONTAGUE SMITH, J. I am of the same opinion. Love has obtained judgment against Shaw, charging him as executor of Ellen Sykes, and a writ of fieri facias has been issued, which follows the judgment. No doubt that judgment binds Shaw, but the present plaintiffs are the rightful executors of Ellen Sykes, and they have interfered on the ground that the goods seized by the sheriff were theirs, and were not in the hands of Shaw as executor to be administered by him, but were in his hands only as their agent. I think the goods were not in Shaw's hands as executor; he was employed by the plaintiffs to manage their business, and was their agent and no more. It is said that the goods were rightly taken in execution notwithstanding, because the plaintiffs had not then taken out probate; but it seems to me that this did not make Shaw an executor de son tort. No doubt he occupied an equivocal position, but the facts that were proved at the trial shew that he was not acting wrongfully in any way, but as agent of the rightful executors, and unless they can be shown to have been wrongdoers the defence set up by the sheriff is not made out. Now, executors before probate can do almost anything incident to their office; probate is only evidence, and not the source, of their title; and the proof of this is, that an action could be brought by them before probate, and that if probate was taken out time enough for profert, according to the old practice, that was sufficient; they can even sell the property of the testator, and can, à fortiori, deal with it by placing it in the hands of an agent. Some confusion has arisen from its having been said, in one case (1), that the executor who has intermeddled with the goods before probate can be sued as an executor de son tort; he can, no doubt, be sued on account of his so intermeddling, which amounts to an election to act as executor, and prevents his saying that he is not such; but he is rather an executor by estoppel than an executor de son tort, and is certainly not a wrongdoer. I quite agree, therefore, that these goods were not liable to be seized under a writ of fi. fa. issued against Shaw as executor.

BRETT, J. On the facts of this case, and the finding of the jury, Mr. Field was obliged to argue that Shaw was an executor de son

(1) *Webster* v. *Webster*, 10 Ves. 93.

tort, because he held as agent for other executors who were wrongdoers; but the executors named in the will can never be treated as wrongdoers on account of their intermeddling with the property.

The cases at law are against the sheriff, especially *Cottle* v. *Aldrich* (1), in which, if Mr. Field's contention is right, the wrong question was left to the jury; the case of *Sharland* v. *Mildon* (2) would, I think, be wrongly decided, if it really bore the interpretation put upon it by Mr. Field.

Rule discharged.

Attorney for plaintiffs: *H. F. Naters.*
Attorneys for defendant, Sir T. Sykes: *Bell, Broderick, & Co.*

LEVY AND ANOTHER *v.* RICE.

Jan. 28.

Practice—Changing Venue—Preponderance of Convenience—Place of Contract and of Defendant's Abode.

In an action for the breach of a contract made at Liverpool, where the defendant resided, and where the contract was to be performed, the venue was laid in London. A judge at chambers on the defendant's application ordered the venue to be changed to Liverpool, upon an affidavit that all the defendant's witnesses, thirteen in number, resided there, and that a cross-action arising out of the same contract was pending there, notwithstanding that the plaintiffs' affidavit stated that all but one of the plaintiffs' witnesses, twenty-eight in number, resided in London.

The Court refused to interfere.

THE plaintiffs, who carry on business in London, by a contract in writing made at Liverpool on the 8th of February, 1869, agreed to buy of the defendant, a sack-manufacturer there, 200,000 Calcutta gunny seed-bags, to be delivered in Liverpool for cash.

The plaintiffs brought an action for a breach of the contract, in not delivering the bags, and laid the venue in London. The defendant took out a summons to change the venue to the West Derby division of the county of Lancaster, upon an affidavit that the cause of action arose at Liverpool, that the contract was entered

(1) 4 M. & S. 175. (2) 5 Hare, 469; 15 L. J. (Ch.) 434.

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into and was to be performed there, and that the alleged breaches, and all the circumstances connected therewith, took place there; that it would be necessary for him to subpœna no less than thirteen witnesses, all of whom resided in Liverpool or in the immediate neighbourhood; that it was believed that all the witnesses intended to be subpœnaed for the plaintiffs also resided in Liverpool or its neighbourhood; that the bags had been re-sold in Liverpool by auction; that the defendant had brought an action against the plaintiffs for not accepting the bags, the venue in which action was laid in the West Derby division of Lancashire; and that it would be much more convenient for all parties concerned, and occasion much less expense, if both actions were tried together at Liverpool. The plaintiffs' affidavit stated that it would be necessary for the plaintiffs to subpœna twenty-eight witnesses as well as to attend themselves to support their case at the trial; that all these witnesses were material and necessary, and all with the exception of one resided in London; and that the cause would be more conveniently, less expensively, and earlier tried in London than at Liverpool.

The master refused to change the venue, and the defendant appealed to Willes, J., who ordered the venue to be changed on the ground that, other matters being equal, the place where the contract was made, the breach took place, and the defendant resided, should be the place of trial.

F. M. White moved to rescind that order. Primâ facie, a plaintiff has a right to lay the venue where he pleases. It is not enough, after issue joined, to shew where the cause of action arose. In Lush's Practice, 3rd ed. 414, it is laid down, that, in order to induce the Court to change the venue from the place where the plaintiff has laid it, "there must be clearly a preponderance of advantage in the change. It is not sufficient for the defendant to allege that all his witnesses reside in that county, or that they are very numerous; he must state how many there will probably be, and then, if it appears that the plaintiff's witnesses reside where the venue is laid, the Court will not interfere. But, if the witnesses on both sides reside in the county, and the defendant shews that witnesses on both sides must be called, that would seem in

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general to be sufficient." In *Jenkins* v. *Hutton* (1), this Court said that, "where it is convenient for the plaintiff to lay his venue in one county, and the defendant in another, the plaintiff has a right to make the election; and in *Durie* v. *Hopwood* (2) it was held that the venue should not be changed from the place where the plaintiff has thought fit to lay it, unless there be a great and obvious preponderance of convenience in trying the cause elsewhere.

BOVILL, C.J. There being no preponderance of convenience either way, the learned judge might, I think, well say that the cause ought to be tried where the contract was made, where the breach took place, and where the defendant resides. He has exercised his discretion in thus deciding, and as we see no ground for saying that he has not exercised it properly, we ought not to interfere. I think there should be no rule.

MONTAGUE SMITH, J. I also think the rule should be refused. The learned judge has exercised his discretion. The scales being even,—all the plaintiffs' witnesses residing in London, and all the defendant's witnesses in Liverpool,—he gave weight to the suggestion that the place where the contract was made, the breach took place, and the defendant resided, ought to be the place of trial. I do not understand him to have said that, if all the plaintiffs' witnesses resided in London, and none or but few of the defendant's witnesses in Liverpool, he would have ordered the venue to be changed to Liverpool merely because the contract was made there. But, the fact of the contract having been made at Liverpool, added to the fact of all the defendant's witnesses being Liverpool men, might well induce him to change the venue to that place. The discretion probably would not have been so exercised a few years ago. But the rule now is, that, if there be a preponderance of convenience in trying a cause in one place rather than another, the venue will be changed. In the course of the argument in *Durie* v. *Hopwood*, Erle, C.J., said (2): "It is important that a cause should be tried where the cause of action arises; and I think it is advisable to act upon that principle so far as the interests of justice can be made to coincide with that course." And again (3): "We are always most

(1) 7 J. B. Moore, 520.
(2) 7 C. B. (N.S.) 835; 29 L. J. (C.P.) 151.
(3) 7 C. B. (N.S.) at p. 837; 29 L. J. (C.P.) 151.

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anxious that causes shall if possible be tried where the matter in contest arose." And in giving judgment, Willes, J. (1), says: "In *Helliwell* v. *Hobson* (2), it was held that the Court will not deprive the plaintiff of the right to lay his venue where he pleases, unless there is a manifest preponderance of convenience in a trial at the place to which it is sought to change the venue. When the question arises again, perhaps that case may require some consideration." The Court there manifestly thought that the preponderance of convenience alone should not induce the judge to change the venue from the place where the plaintiff has elected to lay it. But probably the best rule is, that, where the preponderance of convenience and the place of contract and of the defendant's residence concur, these should regulate the judge's discretion in ordering a change of venue.

BRETT, J. The learned judge did not decline to consider the question of preponderance of convenience. If he had done so, I think there would have been ground of complaint. But this was, I think, a Liverpool cause; and the manifest convenience of the matter is that the trial should take place at Liverpool.

Rule refused.

Attorney for plaintiffs: *W. A. Crump.*

Attorneys for defendant: *Wright & Venn, for J. & H. Quinn, Liverpool.*

Jan. 26.

STEWARD *v.* YOUNG.

Evidence—Slander of Title—Malice—Nonsuit—Practice.

A. died possessed of furniture in a beer-shop. His widow, without taking out administration, continued in possession of the beer-shop for three or four years, and then died, having whilst so in possession conveyed all the furniture by bill of sale to her landlords by way of security for a debt she had contracted with them. After the widow's death, the plaintiff took out letters of administration to the estate of A., and informed the defendant, the landlords' agent, that the bill of sale was invalid, as the widow had no title to the furniture. Subsequently the plaintiff was about to sell the furniture by auction, when the defendant interposed to forbid the sale, and said that he claimed the goods for his

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(1) 7 C. B. (N.S.) at p. 837; 29 L. J. (C.P.) 151.
(2) 3 C. B. (N.S.) 761.

principals under a bill of sale. On proof of these facts, in an action for slander of title, the plaintiff was nonsuited:—

Held, that the mere fact of the defendant's having been told before the sale that the bill of sale was invalid, was no evidence of malice to be left to the jury, and that the plaintiff was therefore properly nonsuited.

SLANDER of title. Declaration that the plaintiff as administrator of Robert Steward, deceased, caused certain furniture of which he was possessed as such administrator to be put up for sale by public auction, and that the defendant at the auction, in the presence and hearing of the persons there assembled, in relation to the plaintiff's right and title as such administrator to sell the furniture, uttered the following slanderous words, "I forbid the sale; for, I hold a bill of sale of all the goods in the house in favour of Mr. Alexander. I shall not allow a single lot to leave the house." Special damage. Plea: Not guilty.

The cause was tried before Keating, J., at the sittings at Westminster in Hilary Term, 1870. Robert Steward, the intestate, formerly kept a beer-shop at Brixton. He died in February, 1865, leaving a widow, who, without having taken out administration, continued to carry on the business until March, 1869, when she died. Whilst she was in possession of the premises, she gave a bill of sale of all the furniture therein (which had belonged to her deceased husband) to Messrs. Alexander, the landlords of the premises, to secure a debt which she had contracted with them. The plaintiff, Robert Steward's brother, after the widow's death took out letters of administration to the estate of Robert Steward, and subsequently entered into negotiations with the landlords for giving up the lease, Messrs. Hards, & Co. acting as brokers on his behalf, and the defendant as broker for Messrs. Alexander. In the course of a correspondence between the brokers with reference to the sale of the furniture and effects, the defendant claimed them under the bill of sale, and Messrs. Hards & Co. intimated that they had been informed that Messrs. Alexanders' claim had been paid off. But, having received better information, they, on the 21st of July, 1869, wrote the defendant, as follows:—

"Dear Sir,—In the hurried note we last wrote you, we stated we had been informed that the bill of sale held by the brewers had been fully satisfied. It appears that, midst press of business, we

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somewhat misunderstood our instructions, which are that 40*l.* has been paid on account of the bill of sale; but that the brewers in reality have no legal right or title whatever to the security they claim, inasmuch as the deceased had no title thereto; a portion of the furniture, moreover, being the property of the heirs-at-law of her late husband. It appears there are very few debts owing; and we shall use our utmost endeavours to realize the effects to the best advantage, in order that they may be discharged. . . .

"Hards, Vaughan, & Leifchild.

"P.S. . . . For the reasons already given, the business can only be wound up in the way we propose, and, either on or off the premises, the furniture will be sold to-morrow. . . . The only matter in which we can now assist you is, in arranging for a speedy surrender of the premises; and this all parties will still be happy to do."

The sale of the furniture and effects took place on the following day, when the defendant attended, and, after handing the bill of sale to the auctioneer, spoke the words charged in the declaration, adding that, if anybody attempted to remove any of the goods, he would give him into custody. In consequence of this interference with the sale, the greater part of the bidders left the room, and the consequence was that the sale produced 70*l.* or 80*l.* less than would otherwise have been realized.

For the defendant it was argued that the plaintiff should be nonsuited, as there was no evidence of express malice. For the plaintiff it was urged that, having had notice that the bill of sale was void, the defendant was not justified in interfering as he did, and that the question should go to the jury.

The learned judge, however, thought there was no evidence of malice which ought to be left to the jury, and he directed a nonsuit.

Montagu Chambers, Q.C., moved for a new trial, on the ground of misdirection. The widow having no legal authority to deal with the goods of the intestate, the bill of sale was void; and of this the defendant was informed before he attended the sale. This of itself was evidence of malice, which ought not to have been withheld from the jury. In Roscoe's Evidence, 11th ed. 527, it is said that the action for slander of title "is not strictly an action for defamation, but an action for special damage to the plaintiff

by a false and malicious statement affecting his title to property:" and *Malachy* v. *Soper* (1) and *Pitt* v. *Donovan* (2) are cited. The learned judge should have put it to the jury whether the defendant did not act contrary to good faith, and whether he had any reasonable ground for supposing the bill of sale to be valid. In *Pitt* v. *Donovan*, Lord Ellenborough says (3): "The point which was peculiarly for the consideration of the jury, and on the event of which this case ought to depend, was not left to them correctly, and it ought therefore to be presented to the consideration of another jury; and that point is, whether the defendant made the statement bonâ fide, and under an honest impression of its being the truth, or whether he made it maliciously, and for the purpose of slandering the title of the person that was about to convey his estate." Here, the learned judge said there was no evidence of want of bona fides. But the defendant knew that the plaintiff was acting under letters of administration to his brother Robert, and therefore he must have known that the widow could not legally convey the property by bill of sale.

[BRETT, J. Was *Wren* v. *Weild* (4) cited?]

It was not. The word "express," which is found in the judgment in that case, is of modern invention with reference to this subject.

[BOVILL, C.J. The brewers might fairly contend that a bill of sale given by an executrix de son tort bound the goods. A statement to that effect, therefore, by them or their agent was a statement made by a person having an interest in the matter, and consequently privileged. It was for the plaintiff to shew malice.]

The fact of the defendant disregarding the caution he had received the day before, when he was distinctly told that the bill of sale was invalid, and the ground of its invalidity, was evidence of malice. The learned judge ought to have left it to the jury to say whether, when he interrupted the sale, the defendant really and bonâ fide believed he had a valid bill of sale. *Brook* v. *Rawl* (5) is a distinct authority to that effect.

BOVILL, C.J. Assuming that there was a bill of sale executed

(1) 3 Bing. N. C. 371.
(2) 1 M. & S. 639.
(3) 1 M. & S. at pp. 643, 644.
(4) Law Rep. 4 Q. B. 730.
(5) 4 Exch. 521; 19 L. J. (Ex.) 114.

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by the widow of Robert Steward in favour of Messrs. Alexander, I think the occasion of the speaking the alleged slander was one which brought it within the rule as to privileged communications. Messrs. Alexander claimed the property which was about to be sold, and I see nothing to shew that they were not justified in asserting their claim. The bill of sale was executed by the widow, who had been for a considerable time in possession of the goods, it may be as executrix de son tort. The defendant, being retained by Messrs. Alexander to protect their interests, went to the sale intending to assert the rights of his principals. If he believed their claim to be a bonâ fide one, he was not only justified, but according to Bayley, J., in *Pitt* v. *Donovan* (1), he was called upon to make the statement complained of. And Lord Ellenborough, in the same case, (2) says: "The jury must arrive at their conclusion in this case through the medium of malice or no malice in the defendant." The primâ facie presumption of malice being rebutted, the onus of proving malice lay upon the plaintiff. If the jury on such a state of facts as appeared in this case had found for the plaintiff, their verdict could not have been allowed to stand. Under these circumstances, therefore, it being from the nature of the case necessary for the plaintiff to establish malice, I think there was no evidence which my Brother Keating could properly have left to the jury. I think there should be no rule.

BYLES, J. I also think my Brother Keating was quite right in withdrawing the case from the jury. In ordinary cases of slander, the uttering of defamatory words primâ facie implies malice. But, in slander of title, two things must concur,—the statement must be false, and it must be malicious. The words charged in the declaration to have been spoken are, "I forbid the sale, for I hold a bill of sale over every thing in the house in favour of Messrs. Alexander." That was strictly and literally true. The defendant did hold a bill of sale such as he described; and that bill of sale was good at all events for such goods as came to the widow's hands after her husband's decease, and, for anything the defendant knew, it might be good for the whole. It seems to me, therefore, that the first essential was wanting, and, further, that malice was nega-

(1) 1 M. & S. at p. 648. (2) 1 M. & S. at p. 645.

tived, for, what the defendant did he was bound to do. It was plainly a case for a nonsuit.

MONTAGUE SMITH, J. I am of the same opinion. No doubt was thrown on the bill of sale as a real transaction. It was meant as a security for Messrs. Alexander by the widow, who seems to have acted as executrix de son tort. The Messrs. Alexander had what they understood to be a valid bill of sale. The plaintiff, under the letters of administration, being about to sell all the goods, it was but natural and proper that Messrs. Alexander should, through their agent, the defendant, give notice of their claim, in order that purchasers at the sale might not be afterwards taken by surprise. In that state of things, nobody could say that the defendant was wrong in interposing in the way he did. It is admitted by Mr. Chambers that it is not enough in slander of title to shew that the claim set up is unfounded or invalid, but that it must further be shewn that the defendant was actuated by a malicious feeling against the plaintiff. The doctrine as to the onus of proof is put in a very plain way by Maule, J., in *Pater* v. *Baker* (1), where he says: "Slander of title ordinarily means a statement of something tending to cut down the extent of title, which is injurious only if it is false. It is essential, to give a cause of action, that the statement should be false. It is essential also that it should be malicious; not, as Lord Ellenborough observes in *Pitt* v. *Donovan* (2), malicious in the worst sense, but with intent to injure the plaintiff. . . . Unless he shews falsehood and malice, and an injury to himself, the plaintiff shews no case to go to the jury." Now, was there any evidence here that the words were spoken in that sense? All that was relied on was, that the defendant had been told the day before the sale that the security he held was valueless. All that the evidence amounted to therefore was, that there was a dispute as to whether the bill of sale was good or not. The fact of the defendant's persisting in asserting the claim notwithstanding the information given to him, clearly does not shew any malicious feeling in the defendant against the plaintiff. It is now settled by the Exchequer Chamber in *Ryder* v. *Wombwell* (3) that a mere

(1) 3 C. B. 831, 868. (2) 1 M. & S. 639, 644.
(3) Law Rep. 4 Ex. 32, 38.

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scintilla of evidence will not justify the judge in leaving a case to the jury. The rule is there laid down by my Brother Willes, in delivering the judgment of the Court, in these terms: "There is in every case, not merely in those arising on a plea of infancy, a preliminary question which is one of law, viz. whether there is any evidence on which the jury could properly find the question for the party on whom the onus of proof lies. If there is not, the judge ought to withdraw the question from the jury, and direct a nonsuit if the onus is on the plaintiff, or direct a verdict for the plaintiff if the onus is on the defendant. It was formerly considered necessary in all cases to leave the question to the jury if there was any evidence, even a scintilla, in support of the case: but it is now settled that the question for the judge (subject of course to review) is, as stated by Maule, J., in *Jewell* v. *Parr* (1), not whether there is literally no evidence, but whether there is none that ought reasonably to satisfy the jury that the fact sought to be proved is established." The question, then, in this case is, whether there was evidence which ought reasonably to have satisfied a jury that the defendant was actuated by feelings of malice towards the plaintiff. It would be absurd to set aside the nonsuit, when upon the evidence we are satisfied that the jury could not properly have found a verdict for the plaintiff.

BRETT, J. I also think the rule should be refused on both grounds. In the first place, there was no evidence to shew that the defendant made an untrue statement. In the next place, there was no evidence of malice in fact. The statement made by the defendant was made in support of a claim set up by him as agent for Messrs. Alexander. If it had been shewn to have been made otherwise than in the bonâ fide furtherance of that claim, there might have been a case for the jury. The only evidence offered with that view was, the letter which informed him that the bill of sale was void in point of law. He did not, however, coincide in that view. That malice must be proved in an action of this kind has long been settled. It is clearly so laid down in *Watson* v. *Reynolds* (2) and *Smith* v. *Spooner* (3), and again very recently in

(1) 13 C. B. at p. 916. (2) M. & M. 1.
(3) 3 Taunt. 246.

the Queen's Bench in *Wren* v. *Weild.* (1) I think the nonsuit was quite right. 1870

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Rule refused.

Attorney for plaintiff: *W. Bristow.*
Attorneys for defendant: *White, Broughton, & White.*

NORBURN *v.* HILLIAM. *Jan.* 28.

Withdrawal of Juror—Subsequent Breach of Agreement under which Juror withdrawn—County Court—Cause sent from Superior Court under 30 & 31 *Vict. c.* 142, *s.* 10—*Practice*—19 & 20 *Vict. c.* 108, *s.* 43.

An action of trespass to land was sent for trial to a county court under 30 & 31 Vict. c. 142, s. 10. The cause came on for trial before a jury, but before the trial was completed the parties agreed that a juror should be withdrawn and that the judge should say what should be done between them. At the next meeting of the Court, the judge was ready to pronounce his opinion, but the defendant, without assigning any reason, withdrew his consent, and the judge consequently did not give any decision:—

Held (Brett, J., dissenting), that the withdrawal of a juror had not, under the circumstances, put an end to the action, because the defendant had not performed his part of the arrangement under which the plaintiff consented to such withdrawal: and the Court made absolute a rule calling upon the judge of the county court to appoint a day for a rehearing.

AN action of trespass to land commenced in this Court was sent for trial in the county court of Northampton holden at Oundle, under the 30 & 31 Vict. c. 142, s. 10. The cause came on to be tried before a jury on the 18th of May, 1869. The case on behalf of the plaintiff was completed, and some evidence was given on behalf of the defendant, when the judge proposed, in order to avoid further litigation, to view the premises in question, and to say what ought to be done between the parties. Both parties consented, and a juror was withdrawn by consent, and such withdrawal was duly entered on the minutes of the court. Subsequently the judge visited the premises, and he afterwards stated that he would give his opinion at the next court; and at a court held on the 22nd of June he was ready to do so, when the defendant's attorney stated that, for reasons which had since arisen, but

(1) Law Rep. 4 Q. B. 730.

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which he did not disclose, his client was no longer willing to abide by the judge's opinion. The judge declined to pronounce his decision, as there were no means by which he could compel either party to adopt it; and he recommended the plaintiff's attorney to issue a fresh writ, or, with the defendant's consent, to issue a plaint and try the cause before him in the first instance.

Beasley, in Michaelmas Term last, obtained a rule under the 19 & 20 Vict. c. 108, s. 43, calling upon the judge and the defendant to shew cause why the judge should not proceed to give judgment in the action or appoint a day for a re-hearing.

The Attorney-General, and *Archibald*, shewed cause on behalf of the judge. The first branch of the rule calls upon the judge to do that which he cannot do, viz. proceed to give judgment. He can only do so after a trial or by consent. There has been no complete trial, and the consent has been withdrawn. As to the second branch of the rule, there can be no rehearing, because the withdrawal of the juror has put an end to the action. The plaintiff may bring a fresh action, the condition upon which he consented to withdraw a juror not having been performed, by reason of the misconduct of the defendant. The judge has made no default.

Grantham, for the defendant. The proper course for the plaintiff to pursue would be to commence his proceedings de novo. The judge of the county court cannot be called upon to pronounce an opinion which will bind nobody. If the plaintiff wants a new trial, the application must be made to the judge of the county court. When a case is sent down for trial, it becomes for all purposes a county court case. Whether the plaintiff can proceed at all after the withdrawal of a juror, may well be doubted: *Gibbs* v. *Ralph*. (1) Perhaps the plaintiff might have an action against the defendant for breach of his agreement to refer the matter to the judge out of court.

Beasley, in support of the rule. The application is properly made to this Court. The action is still an action in this Court, though the issues are directed by the order to be tried in the county court. Generally speaking, no doubt, when a juror is withdrawn, there is an end of the action: and the Court would order a

(1) 14 M. & W. 804; and see *Everett* v. *Youells*, 3 B. & Ad. 349.

stay of proceedings if another action were brought for the same cause. But here, the defendant, by receding from the arrangement made at the trial, has been guilty of a breach of faith: and the plaintiff is remitted to his rights as they stood at the time when that arrangement was entered into.

BOVILL, C.J. There can be no doubt that, according to the ordinary understanding of the profession, the withdrawal of a juror is an agreement that the litigation is at an end, and no future action can be brought for the same cause. But here there was not simply an agreement that a juror should be withdrawn, but it was part of a general arrangement between the parties to the effect that there should be no formal determination of the issues joined between them, but that the judge should proceed to view the premises which were the subject of the dispute, and should decide what should be done between the parties. It was in effect the substitution of one tribunal for another. That being the arrangement, no one can doubt that the juror would not have been withdrawn but for the anticipation that the entire agreement would be carried into effect in mutual good faith. A juror having accordingly been withdrawn, the judge proceeded to view the premises, and was prepared to pronounce his decision, when the defendant, for some reason which is not disclosed, thought fit to repudiate the rest of the arrangement. Repudiating a part was, under the circumstances, a repudiation of the whole. I should be disposed to go further, and to say that the conduct of the defendant amounted to a breach of good faith: it is, however, enough to say that through his fault there has been a failure to complete the arrangement which was entered into. I think it is impossible to allow such a course of conduct to be successful, by holding, as Mr. Grantham wishes us to do, that one part of the bargain shall stand whilst the other part is put an end to. In *Bentley* v. *Fleming* (1), where there had been a misunderstanding or miscarriage on the taking of the verdict by the associate in the absence of the judge, this Court ordered a new trial. So, where a verdict had been taken for the plaintiff, subject to a case to be settled by a barrister, and the defendant had refused to procure the signature of a serjeant

(1) 1 C. B. 479.

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to the case when so settled, this Court made a rule that the record and postea should be delivered by the associate to the plaintiff, with liberty to him to enter up judgment thereon, unless the defendant should within a week cause the case to be signed: *Doe* d. *Phillips* v. *Rollings*. (1) Under the circumstances of this case, I feel no hesitation in saying that the Court is bound to put the plaintiff in a condition to have his cause tried. I think the judge of the county court had power to proceed with the trial. He thought that the plaintiff's only remedy was by a fresh action. But now that all the facts are before us, it is clear to my mind that we have power under the statute (19 & 20 Vict. c. 108, s. 43) to make an order on him to proceed to try the cause, and so to place the parties in the situation in which they stood before the abortive arrangement was made. That part of the rule which calls upon the judge to proceed to give judgment fails. It never was intended that he should pronounce a formal judgment, but merely to make an amicable settlement of the difference between the parties.

MONTAGUE SMITH, J. I am of the same opinion. There is no ground for impeaching the conduct of the judge in not proceeding to give judgment. It is plain that he undertook to settle the matter, not as judge, but, with the consent of both parties, as an indifferent person. He has always been ready so to decide. He has only been prevented from doing so by the refusal of the defendant to abide by his decision. The first branch of the rule, therefore, must be disallowed. I agree, however, with my Lord that the second branch, which requires the judge to proceed in the hearing of the cause, must be made absolute. It is clear, beyond all question, that the withdrawal of a juror by consent not only puts an end to the proceedings in the cause, but also puts an end to the whole matter, so as to prevent its being litigated in a subsequent action; for, if either party should attempt it, the Court would stay the proceedings in that or in any fresh action brought for the same cause. That is the effect which is given to the withdrawal of a juror, because such was the intention of the parties. But that is no stronger than a consent to a nonsuit on terms. There, if one party afterwards repudiates the terms agreed on, under circum-

(1) 2 C. B. 842.

stances such as are disclosed here, it would be the bounden duty of the Court not to allow the proceedings to be terminated, and one party to get the advantage of the arrangement without performing the stipulations on his part. Or, suppose a verdict is taken by consent, subject to a reference, and one of the parties, from whatever motive, refuses to go on with the reference, it cannot be doubted that the Court has power to set aside the verdict, and order a new trial. Indeed the Court habitually sets aside proceedings, even after final judgment, where they have been taken contrary to the agreement of the parties, and in that sense against good faith. I think we may very well say here that what took place did not put an end to the action. In order to avoid further litigation and expense, the judge suggested that he should view the premises and say what ought to be done between the parties. Both plaintiff and defendant assent to that course, and a juror is withdrawn, and the judge views the premises and expresses himself ready to pronounce his opinion. The defendant afterwards withdraws from the arrangement; and now he contends that the action is at an end. I think we cannot allow an argument founded upon his own breach of faith to prevail. Mr. Grantham says the plaintiff may perhaps have an action against the defendant for the breach of his agreement to refer. But the answer to that is that in such an action the real matter in dispute could not be determined. The plaintiff could only recover damages for the breach of the agreement. Suppose the action were brought for the recovery of a chattel which in the eyes of the plaintiff had a peculiar value, would it be any satisfaction to the plaintiff for the breach of an arrangement under which it was to be given up to him to be put to his action for damages? I am clearly of opinion that we have power to do what the last branch of the rule asks us to do, and that we ought to exercise that power.

BRETT, J. I am glad to find that the rest of the Court can see their way to a decision upon this rule. I certainly have no sympathy with the defendant, who has been guilty of very improper conduct: but I cannot help thinking that he has the law on his side. There was, it seems, an agreement that a juror should be withdrawn, on the terms of the matter in dispute between the

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parties being left to the judge, who was to view the premises and then pronounce his opinion as to what should be done to put an end to the litigation. It is not alleged that the defendant was guilty of any fraud at the time of entering into that agreement. The universal understanding undoubtedly is that an agreement to withdraw a juror is an agreement to put an end to the cause. There was, therefore, a binding agreement between these parties which we have no authority to set aside without their consent. The defendant has, possibly from a bad motive, broken his agreement: but that does not rescind the agreement, or make it less binding on the parties and on the Court. It seems to me that the only remedy for the plaintiff under the circumstances is an action for the breach of that agreement. I do not go the length of saying that the Court would be bound to stay a subsequent action for the original cause of action: but I think we have no jurisdiction to make the rule absolute.

Beasley. The statute (19 & 20 Vict. c. 108, s. 43) places the costs of the rule in the discretion of the Court. The plaintiff should have costs as against the defendant.

PER CURIAM. The defendant by his withdrawal from the arrangement has been the cause of all the inconvenience and expense. The rule will be absolute that the judge do proceed to try this cause, and that the defendant do pay to the plaintiff his costs of the application.

Rule absolute accordingly.

Attorney for plaintiff: *W. F. Law, Stamford.*

Attorneys for defendant: *Rooks, Kenrick, & Harston, for R. Richardson, Oundle.*

SINCLAIR *v.* THE GREAT EASTERN RAILWAY COMPANY. 1870 Jan. 26.

Taxation of Costs—Number of Counsel on a Reference—Arbitrator's Fees—Master's Discretion—Practice.

It is the usual practice on the taxation of the costs of a reference to allow one counsel only on each side; but this is not an inflexible rule, and each case must depend upon its own particular circumstances.

The master, on the taxation of the costs of a reference which involved a large sum of money and a long and complicated inquiry, allowed the fees of one only of two counsel retained by the plaintiff,—assuming that there was an inflexible rule that only one counsel should be allowed:—

Held, that the master should review his taxation in order that he might have an opportunity of exercising his discretion in the matter.

Hawkins v. *Rigby* (8 C. B. (N. S.) 271; 29 L. J. (C.P.) 228) explained.

Where a Queen's Counsel acts as arbitrator, the ordinary scale of fees applies as in other cases. But it is competent to the master, in his discretion, to increase the usual allowance where he thinks the usual allowance is insufficient.

THE plaintiff claimed from the defendants 47,304*l.* 13*s.* 1*d.*, as the balance due to him as engineer for commission, &c., on a variety of works constructed for the defendants under his superintendence. The cause came on for trial at the sittings in London after last Hilary Term, before Bovill, C.J., when a verdict was taken by consent for the plaintiff, subject to a reference to a Queen's Counsel. There were twenty-four meetings before the arbitrator; each party being represented by a Queen's Counsel and a junior counsel. The arbitrator ultimately made an award in favour of the plaintiff for 28,850*l.*, and directed that the defendants should bear their own costs, and that they should pay to the plaintiff his costs of and incidental to the reference and award.

On taxation, the master disallowed the costs and incidental charges of instructing the plaintiff's leading counsel, on the ground that it was an inflexible rule to allow the costs of one counsel only upon an arbitration, irrespective of the amount in dispute or the importance of the case. He also disallowed a portion of the sum paid by the plaintiff for the arbitrator's fees,—the sum actually paid to the arbitrator being 553*l.* 17*s.* 9*d.*, and the sum allowed being 340*l.*,—disregarding, as was suggested, the fact that the arbitrator was a Queen's Counsel, and only allowing such fees as would have been allowed to an ordinary arbitrator.

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Sir G. Honyman, Q.C., in Michaelmas Term last, obtained a rule for a review of the taxation, on the ground that the master had erred in supposing the rule as to the allowance of one counsel only before the arbitrator to be an inflexible one, and that the importance of the matters in issue on this reference made it reasonable that the plaintiff should be allowed the assistance of a Queen's Counsel; and also that the fees paid to the arbitrator were improperly reduced.

Keane, Q.C., shewed cause. The disallowance of a second counsel on the reference was right. In *Hawkins* v. *Rigby* (1), the master allowed only one counsel, and the Court declined to interfere. Erle, C.J., says (2): "The general practice of this Court has been to allow one counsel only in such cases . . . . If it were to be a matter of discussion in each case whether the circumstances justified two counsel or not, much difficulty and perplexity would ensue. I should certainly be very loth to allow the salutary rule of allowing one counsel only to be broken in upon." And Byles, J., adds: "In declining to make this rule absolute for a review of the taxation in respect of the disallowance of the second counsel, we are laying down no new rule, but are only adhering to the practice of our own Court." The correctness of that view has never been impeached; and this case has always been considered a conclusive authority on the subject: Scott on Costs, 3rd ed. 351, where the recognized scale of fees payable to arbitrators and counsel on references is given. Secondly, the fees allowed to the arbitrator are sufficient. If the parties choose to avail themselves of the services of gentlemen of extraordinary eminence, it is a luxury which they must enjoy at their own cost. In no case are the costs which are allowed to the successful litigant an absolute indemnity for the expenditure incurred. The sum allowed here for the arbitrator's fees actually exceeds the scale allowance by 100*l.*

Sir G. Honyman, Q.C., in support of the rule. *Hawkins* v. *Rigby* (1) shews that there is no inflexible rule to restrain the master from allowing more than one counsel on a reference. Indeed, in the course of the argument in that case, several instances are given of two and even three counsel having been allowed.

(1) 8 C. B. (N. S.) 271; 29 L. J. (C.P.) 228.

(2) 8 C. B. (N. S.) at p. 275; 29 L. J. (C.P.) at p. 230.

In all other cases, the number of counsel is left wholly to the discretion of the master: see Marshall on Costs, 434; Gray on Costs, 503; Scott on Costs, 3rd ed. 129 (*a*); *Sharp* v. *Ashby* (1); *Lockstone* v. *London and Brighton Ry. Co.* (2) There is no reason why the same rule should not apply to references; and indeed the passage in Marshall (p. 434) shews that it does extend to them; and for this he cites *Croomes* v. *Gore.* (3) If the cause had been tried, two counsel and other incidental expenses would have been allowed as a matter of course. Then, if one counsel only was to be employed, upon what principle is it that the master has disallowed the senior? There is no reason why the plaintiff should not avail himself of the counsel in whom he places the greatest confidence. As to the arbitrator's fees, it was by arrangement with the counsel for the defendants that a Queen's Counsel, in whom both sides could place implicit confidence, was selected for arbitrator. The scale of fees referred to was framed with a view to the ordinary run of cases, in which Queen's Counsel do not usually appear. But there may be cases, and this is one of them, where, the parties having agreed that a gentleman of high standing in the profession shall settle the matters in dispute between them, the master ought to allow larger fees.

BOVILL, C.J. With regard to the last point, viz. the arbitrator's fees, I am of opinion that the rule fails. The fees paid to the arbitrator amounted to 553*l.* 17*s.* 9*d.*, of which the master taxed off 213*l.* 17*s.* 9*d.*, leaving 340*l.* In the bill, the charge appeared in one sum. The master inquired into the matter. Being guided by the general scale which is adopted by all the masters, and looking at the nature and the circumstances of the particular case, in addition to the ordinary charges there stated, he has allowed a further sum of 100*l.* It has been said that that scale was framed with reference to cases in which junior counsel usually act as arbitrators. The scale, however, makes no distinction in respect of rank: and it may well be that there should be an ordinary allowance to arbitrators generally. But I do not understand that scale to be so absolutely binding on the master that he may not in his

(1) 12 M. & W. 732. (2) 12 C. B. (N. S.) 243.
(3) 1 H. & N. 14; 25 L. J. (Ex.) 267.

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discretion increase the allowance when a proper case presents itself. It is right that there should be a recognized scale of fees, in order that counsel may be guided in their acceptance or rejection of references unless the parties can agree to an increased charge. But in this case the master has exercised his discretion, and I have heard nothing to satisfy me that he has not exercised it properly.

As to the disallowance of a second counsel, the master proceeded upon a decision of this Court in *Hawkins* v. *Rigby* (1), in which the Court refused to direct a review of the taxation on the ground of the disallowance of a second counsel at a reference, but at the same time intimated that there was no inflexible rule on the subject. The master seems to have thought that if two counsel were not to be allowed in that case, they should not be in any case. But it is quite clear that there is not any such inflexible rule. An instance is mentioned in that case (2) of two counsel having been allowed in the Queen's Bench; and two other cases are also alluded to, one in this Court and the other in the Exchequer. A case of *Davis* v. *Pratt* is also referred to in a note there (3), where two counsel were allowed on the taxation of the costs of an arbitration. And when the case of *Croomes* v. *Gore* (4) came before the Court of Exchequer, upon a question whether the successful party on a reference was entitled to the costs of a short-hand writer's notes of the evidence, Alderson, B., observed (5) that "the plaintiff should have retained a junior counsel, and not a person who is uneducated as regards law." After these several authorities, it cannot be doubted that there are cases in which the attendance of two counsel on a reference should be allowed. As far as I could judge from what I saw of this case at nisi prius, I am satisfied that it was one in which it was proper that two counsel should be engaged. The company, it appears, was represented by two counsel; and, looking at all the circumstances, at the nature of the questions to be investigated, and the large amount involved, I am clearly of opinion that two counsel ought to be allowed. The master has

(1) 8 C. B. (N.S.) 271; 29 L. J (C.P.) 228.

(2) 8 C. B. (N. S.) at p. 272; 29 L. J. (C.P.) at pp. 229, 230.

(3) 8 C. B. (N. S.) at p. 274, n.

(4) 1 H. & N. 14; 25 L. J. (Ex.) 267

(5) 1 H. & N. at p. 15; 25 L. J. (Ex.) 267.

acted upon a view of the rule which precluded him from the exercise of any discretion in the matter. It must go back to him with an intimation that in the opinion of the Court the plaintiff was entitled to two counsel. In an ordinary case of an action for goods sold, or for an assault, two counsel are allowed not only on the trial but on motions also. It is not our intention to break in upon the rule which governs ordinary cases. All we decide is, that, in cases of magnitude, a more liberal rule should prevail. As to the amount of fees, we say nothing. We simply make the rule absolute for a review of the taxation as regards the allowance of two counsel.

BYLES, J. I entirely agree with what has fallen from my Lord. Having been a party to the decision in *Hawkins* v. *Rigby* (1), I may be allowed to say that I think that case ought not to be understood as allowing the master no discretion in this matter. My Brother Smith, in his argument in support of the rule in *Hawkins* v. *Rigby* (1), observes that "there is no inflexible rule as to the number of counsel to be allowed on a reference;" and no dissent from that proposition is expressed by any member of the Court. And that seems to have been the impression of the reporter; for, he begins the marginal note, when the matter is fresh in his mind, "Although there is no *inflexible* rule to restrain the master from allowing more than one counsel on a reference, such allowance is not to be encouraged." *Hawkins* v. *Rigby* (1), therefore, is no authority in favour of the inflexibility of the rule. This case might have involved questions the value of which exceeded a million; and the inquiry might have been protracted for months or years. The reason and good sense of the thing shew that there cannot be an inflexible rule, as suggested.

MONTAGUE SMITH, J. I am of the same opinion. It seems to be agreed on all hands that the rule against the allowance of a second counsel on a reference is not an inflexible one. If it had been, I for one should have thought it ought to be altered. The master has put a construction upon the decision of this Court in *Hawkins* v. *Rigby* (1) which I must own I think he might well be excused for doing. The impression of the whole Court there

(1) 8 C. B. (N. S.) 271; 29 L. J. (C.P.) 228.

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certainly was, that, if ever there was a case which would justify the retaining of two counsel, it was that case; and yet they refused to direct the taxation to be reviewed. Under these circumstances, the master might well think the rule almost inflexible. If, then, there be no inflexible rule, it is for the master to exercise his discretion in each case. In ordinary cases, no doubt, one counsel only should be allowed. But, in cases of great complication and perplexity, it may be proper that two should be retained. I may observe that cases of this description have largely increased since *Hawkins* v. *Rigby* (1) occurred. The inquiry before the arbitrator in this case was one of magnitude and importance. The arbitrator was the final judge. I think it is manifestly right and just that the plaintiff in such a case should have the same legal assistance as he would have had at nisi prius. When the matter is left at large, the master will exercise his discretion; and, where he has done so, the Court will be slow to interfere. As to the fees allowed to the arbitrator, I concur with my Lord in thinking that the master has exercised a right discretion. He has allowed the usual fees according to the scale, and has in his discretion allowed a considerable sum in addition on account of the additional labour and difficulty of the case; and I see no reason to find fault with what he has done. There is no distinction in the scale between one arbitrator and another. Every counsel knows that, and that the master does in practice increase the fees as circumstances render it proper. Where there is a reason for intrusting the matter to one who from his superior rank is entitled to a special fee, some arrangement should be made at the time. The review will be confined to the allowance of two counsel.

BRETT, J. As to the arbitrator's fees, I also think the rule should be discharged, but only on the ground that the master has exercised his discretion in the matter. If he refused to make any distinction between Queen's Counsel and an ordinary arbitrator, I think he was quite right. There is no such distinction. As to the refusal to allow for the attendance of two counsel, I think the rule should be made absolute. The master, upon the authority of *Hawkins* v. *Rigby* (1), assumed that there was an inflexible rule on

(1) 8 C. B. (N. S.) 271; 29 L. J. (C.P.) 228.

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the subject, and allowed only the fees paid to the junior counsel. That case, however, is rather an authority the other way: and, if there had been any such inflexible rule, I think it is quite time it should be rescinded. I think it would have been a want of ordinary prudence on the part of the plaintiff, if he had gone to trial with one counsel only, and that great injustice would be done by restricting him in that respect.

Rule absolute accordingly.

Attorneys for plaintiff: *Thomas & Hollams.*
Attorney for defendants: *W. H. Smith.*

YGLESIAS AND OTHERS *v.* THE ROYAL EXCHANGE ASSURANCE CORPORATION.

Jan. 29.

Taxation of Costs—Sending Commissioner from this Country to examine Witnesses abroad—Master's Discretion—Practice.

On the taxation of costs in an action on a policy of insurance, where the questions involved were of an extremely complicated and important character, the master, having duly considered all the circumstances, allowed the expenses of sending a barrister as commissioner to examine witnesses in the Canaries.

The Court refused to interfere with his discretion.

ACTION on a policy of insurance on a cargo of barley, potatoes, and cochineal shipped at Las Palmas, in the Canary Islands, on board the ship *Candida*. The claim was resisted by the defendants, on the grounds (amongst others) that the goods were not shipped, that the vessel did not sail as alleged, and that the goods were not lost by a peril insured against,—the suggestion being that the article shipped as cochineal was in reality barley in bags. Criminal proceedings had been instituted in the Spanish courts by Lloyds' Salvage Association against the captain and mate of the vessel for the alleged fraud; which proceedings, however, ultimately resulted in their acquittal. The plaintiffs being unable to obtain particulars of the proceedings in the Spanish courts, in order to establish their claim and to prove the actual purchase and shipment of the property insured, and the facts connected with the loss,

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procured a commission for the examination of witnesses at the Canary Islands, addressed to three commissioners, two of whom resided in the Canaries, and the third was Mr. Underdown, an English barrister, resident in London. The defendants, who had liberty to join in the commission, named as commissioners on their behalf a Captain Heathcote, who was well skilled in commercial and maritime affairs, and a Spanish advocate of Cadiz, and also sent out an English barrister resident in London to conduct the examination on their behalf.

Finding that the defendants had determined to send out a barrister from this country, and that there was no person on the spot capable of conducting the examination of witnesses, the plaintiffs arranged that Mr. Underdown should act for them rather in the character of counsel than of commissioner. In addition to the interrogatories and cross-interrogatories originally sent out, it became necessary during the sitting of the commission to frame on the spot about 200 additional interrogatories and 800 additional cross-interrogatories, which additional interrogatories were prepared by Mr. Underdown, and the cross-interrogatories by the defendants' counsel. The commission sat for twenty-two days; and Mr. Underdown was engaged thereon and in travelling to and fro altogether forty-five days.

At the trial before Bovill, C.J., the case was found to be one of much difficulty and intricacy, involving minute inquiries as to purchases of cochineal, the mode of obtaining it, &c. A verdict was found for the plaintiffs, the amount to be settled by an average-stater.

On taxation of the plaintiffs' costs, the master allowed a charge of 575*l.* 9*s.* 8*d.* for the fees and expenses of Mr. Underdown (being 10*l.* 10*s.* per day, and 102*l.* 19*s.* 8*d.* for travelling expenses), though it was objected on the part of the defendants that the plaintiffs might and ought to have appointed a person on the spot, the cost of which would not have exceeded 150*l.*

Watkin Williams moved for a rule to review the taxation on the ground that the allowance of the commissioner's fees and expenses was excessive. In *Potter* v. *Rankin* (1), a case of much complica-

(1) Law Rep. 4 C. P. 76.

tion and importance, the master, on taxation of the defendant's costs, disallowed the expenses incurred on his behalf in legal assistance to the commissioners in conducting the vivâ voce examination of several witnesses during the execution of a commission at Calcutta, although the order for the commission provided that "the costs of the order, and of the examination, interrogatories, cross-interrogatories, and office-copies thereof, and all other costs incidental thereto, should be costs in the cause," and the Court declined to interfere with his discretion.

J. C. Mathew shewed cause in the first instance. *Potter* v. *Rankin* (1) is a strong authority to shew that the matter is entirely for the discretion of the master, who, having the whole history of the litigation before him, has the best means of forming a judgment on the propriety of incurring the particular charge. The facts disclosed by the affidavits here conclusively shew that the employment by the plaintiffs of a barrister was, under the circumstances, only a reasonable and necessary precaution.

BOVILL, C.J. This matter depends not on any positive or peremptory rule. Indeed it is impossible to lay down any general rule on the subject. In an ordinary case, of course, the master would refuse to allow the expenses of a barrister sent out to conduct a commission. But there undoubtedly are cases where it would be highly expedient for each side to send one: and there is no absolute rule against it. The propriety of doing so must depend entirely upon the nature and circumstances of the particular case. This was a case of great importance to the shippers of the goods and to those who supplied them. Criminal charges were at the instance of the defendants preferred against several of the parties concerned; and the whole matter required the most minute and careful investigation. The commissioners had to enter into elaborate inquiries into the production and supply of cochineal, and to examine a great variety of books and accounts. A great number of questions were added by Mr. Underdown and the defendants' counsel, respectively, to the interrogatories originally sent out. We must look at the state of circumstances at the time the commission was sent out. The conduct of the defendants made it a

(1) Law Rep. 4 C. P. 76.

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very important one in every point of view. They named as one of their commissioners a gentleman extremely well versed in all that relates to shipping and insurance, and well able to conduct an investigation of this kind. They also had the services of an able counsel. All these matters were to be taken into consideration by the master in determining his discretion. The duty must be delegated to some one. The master has, with the briefs before him, investigated the matter, and has come to the conclusion that the expense in question was reasonably and properly incurred. He having done so, it must be clearly shewn that he has erroneously exercised his discretion before we can interfere. I heard the case for nearly five days; the contention rested mainly upon the answers to the interrogatories and cross-interrogatories; and, sitting here to determine whether or not the master has come to a right conclusion, so far from seeing that he has erred, I am of opinion that he was quite right. Following the rule laid down in *Potter* v. *Rankin* (1), I think this rule should be refused.

MONTAGUE SMITH, J. I am of the same opinion. The propriety of sending out a commissioner from this country to a distant place must obviously depend upon the particular circumstances of each case. The nature and complexity of the action, the value of the subject-matter in dispute, the accessibility of the spot, and whether resident commissioners properly qualified can be found in the place, are all considerations which must be taken into account. It is impossible to lay down any rigid rule upon the subject, or to say that such expenses can never be allowed. If the witnesses are to be examined in France or Italy, for instance, it might be a saving of expense to send out a commissioner. A discretion in the matter must be left to some one; and it has usually been left to the master, with whose discretion the Court is slow to interfere. His decision is always considered final, unless he appears to have proceeded upon a wrong principle, or has exercised his discretion in a way which is manifestly wrong. I do not see that the master has done so here. My Lord reports to us that the questions involved in the case were complicated and extremely difficult; and the defendants themselves by their conduct have

(1) Law Rep. 4 C. P. 76.

shewn the necessity for the course pursued by the plaintiffs, by joining in the commission, making Captain Heathcote and a Spanish advocate their commissioners, and sending out a barrister to conduct the examination of the witnesses on their behalf. It is the duty of the master, in the first instance, to consider whether the expenses of the commissioner should be allowed, and upon what principle and on what scale, subject to revision by the Court under the conditions I have already stated. I think it would be better that it should be settled beforehand whether a commissioner should go out from this country or not. That, however, has not been the practice hitherto.

BRETT, J. We have had several discussions on the subject of costs during the present term, and the more I hear the more I am satisfied of the expediency of holding that the master's discretion should generally govern. Where the master has exercised his discretion, we should be very loth to interfere; though I think it would be equally objectionable if we were to act upon a rigid rule not to interfere in any case unless some principle is involved. Upon the present occasion, the master has exercised his discretion, and I think very properly exercised it. The case was one of considerable importance and difficulty, and one in which I think the master, under all the circumstances, might properly come to the conclusion that the expense of sending out a professional man was reasonably incurred. This decision is quite in accordance with *Potter* v. *Rankin* (1), as I understand it. I think the rule should be refused.

Rule refused.

Attorneys for plaintiffs: *Maynard, Son, & Co.*
Attorneys for defendants: *Freshfields.*

(1) Law Rep. 4 C. P. 76.

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Jan. 31.

COSSEY AND WIFE *v.* THE LONDON, BRIGHTON, AND SOUTH COAST RAILWAY COMPANY.

Inspection of Documents—Common Law Procedure Act, 1854 (17 & 18 *Vict. c.* 125), *s.* 50—14 & 15 *Vict. c.* 99, *s.* 6—*Privileged Communications—Evidence—Practice.*

The defendants, in order to ascertain whether or not they ought to yield to a claim by the plaintiffs for damages for personal injuries alleged to have been sustained by the plaintiffs in an accident on the defendants' line, sent their medical officer before litigation commenced or was formally threatened, to report to them upon the nature of the plaintiffs' injuries:—

Held, that the reports of the medical officer were privileged, and that the plaintiffs were therefore not entitled to have inspection of them.

Baker v. *London and South Western Ry. Co.* (Law Rep. 3 Q. B. 91) distinguished.

THE plaintiff and his wife were passengers in a train which was on the 23rd of June, 1869, through the negligence of the defendants' servants, run into by another train at the New Cross station. Both the plaintiff and his wife were alleged to have been injured on that occasion: and on the 12th of July the plaintiff addressed the following letter to the defendants' secretary:—

"Sir,—I regret to inform you that the effects of the collision at the New Cross station on the evening of the 23rd of June has been much more serious than I had anticipated. I have suffered very much myself. Nearly every joint has been affected, and it has been with difficulty and pain that I have been able to do anything. I feel shaken all over, and everything is burdensome. My wife is more seriously affected. The veins in the legs have been inflamed. The pain in the back has been very severe, and the system altogether upset. In addition, she is ruptured, and has been compelled to wear a truss. As to all these matters, I beg to refer you to Dr. Ingoldby."

On the 23rd of July, Dr. Maclure, who is the regular and permanent medical officer of the company, and is employed at a salary to attend the servants of the company, and to examine into and report upon all cases of injuries to passengers on the railway, with the view of advising the company thereon, at the request of the defendants, visited the plaintiffs, in order to examine into the

nature of their alleged injuries, and with a view of enabling the company's advisers to consider what should be done in reference to the plaintiffs' claim for compensation. Dr. Maclure, on the 7th of October, made certain reports to the company as the result of his visit.

On the 19th of November, a letter was sent by the plaintiffs to the defendants threatening proceedings. On the 24th of December the writ was issued.

On the 5th of January the declaration was delivered. On the 10th an order was made, that the plaintiffs should furnish particulars of their injuries. On the 25th of January the defendants pleaded: 1. Not guilty. 2. That the plaintiffs were not passengers by the train, as alleged.

The plaintiffs took out a summons for inspection and copies of the reports of Dr. Maclure. The summons was heard by Willes, J., who, in deference to the case of *Baker* v. *London and South Western Ry. Co.* (1), referred the matter to the Court.

Jan. 29. *Crompton* accordingly moved for a rule. This case must be governed by *Baker* v. *London and South Western Ry. Co.* (1) There, the defendants had sent a clerk and a medical officer to see the deceased, for whose death the action was brought, and ascertain his state, and to negotiate as to the compensation to be made to him; and the Court held that the plaintiffs were entitled to inspection of the reports made to the company by these officers of their interview with the deceased. Cockburn, C.J., in giving judgment, refers to *Chartered Bank of India* v. *Rich* (2), for the purpose of distinguishing it, and says: "When you send your agents to see and negotiate with the other party, whatever passes at such interviews ought to be made known, and the other party, or those representing him, have a right to inspect the communications respecting them. The documents in such a case appear to me to come within the principle of the decision in *Daniel* v. *Bond*." (3) Where the plaintiff has in such a case as this submitted himself to examination by a medical man sent on behalf of the company, it clearly should be taken to be an implied

(1) Law Rep. 3 Q. B. 91. (2) 4 B. & S. 73; 32 L. J. (Q.B.) 300.
(3) 9 C. B. (N. S) 716.

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condition that he should have access to the reports made by the medical man to the company thereon. The Court may, under the recent Act, 31 & 32 Vict. c. 119, s. 26, order that the person injured be examined by some duly qualified medical practitioner, and in an order under that statute a condition may be inserted that the plaintiff shall see the report made by the doctor. It nowhere appears that these reports were obtained with a view to litigation. The object was rather to prevent litigation. What the medical man did was done in the regular course of his duty; and these documents fall within the principle of those of which inspection was granted in *Woolley* v. *North London Ry. Co.* (1)

Joyce shewed cause in the first instance. The question of privilege does not depend upon whether the writ has been issued or not at the time the documents sought to be inspected were obtained. Consultations between an attorney and his client with a prospect of litigation clearly would be privileged. The plaintiff's letter of the 12th of July, 1869, is equivalent to a claim for compensation; and upon that the defendants sent their medical man to examine the plaintiffs and report the result of the examination. There is no implied agreement that the plaintiffs shall be informed of the opinion the medical man has arrived at. These reports clearly fall within the class of those which were held to be privileged in *Woolley* v. *North London Ry. Co.* (1) In *Ross* v. *Gibbs* (2) it was held that communications with an unprofessional agent in anticipation of litigation, and with a view to the prosecution of, or defence to, a claim to the matter in dispute, are privileged. If *Baker* v. *London and South Western Ry. Co.* (3) is inconsistent with this view, it is virtually overruled by *Woolley* v. *North London Ry. Co.* (1) Besides, in *Baker* v. *London and South Western Ry. Co.* (3) (though it does not so appear in the report) there was a replication of fraud to the plea of accord and satisfaction. (4)

Crompton, in reply.

Cur. adv. vult.

(1) Law Rep. 4 C. P. 602
(2) Law Rep. 8 Eq. 522.
(3) Law Rep. 3 Q. B. 91.
(4) In *Baker* v. *London and South Western Ry. Co.* (Law Rep. 3 Q. B. 91) there was ultimately a replication of fraud, but when the rule for inspection was made absolute (25th of November, 1867), the defendants had pleaded, as stated in the report, but the plaintiffs had not replied. The plaintiffs subsequently joined issue, and after-

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Jan. 31. BOVILL, C.J. In this case an application was made to my Brother Willes at chambers for the production of certain reports which had been made to the defendants by Dr. Maclure, a medical man employed by them to examine and report upon the nature and extent of the injuries which the plaintiffs had sustained in consequence of an accident on the defendants' railway. Being pressed with the case of *Baker* v. *London and South Western Ry. Co.* (1), my Brother Willes declined to make an order but referred the matter to the Court. A motion has accordingly been made, against which cause was shewn in the first instance. The reports in question were made before the commencement of the action. Their production was resisted, upon the ground that they are privileged, inasmuch as they were obtained for the information and guidance of the defendants with reference to impending litigation. There is no doubt about the principle upon which this Court, following the decisions of the other Courts, deals with these matters. The rule as to reports of this description is very clearly stated in *Woolley* v. *North London Ry. Co.* (2), viz. that, "where a report is made by an officer of a company to the manager for the purpose of conveying information to him upon the subjects to which it relates, it is not privileged, whether made before or after litigation has been commenced or threatened, and whether it contains matters of fact or of mere opinion"—such report being made in the ordinary course of the duty of the person making it. We also intimated, and I retain that impression, that, "if opinions are obtained confidentially with a view to litigation, they are privileged, on the ground laid down by the Court of Queen's Bench in *Chartered Bank of India* v. *Rich.*" (3) There, after the defendant had ceased to be the plaintiffs' agent at Bombay, and after the dispute between them had arisen, but before any proceedings had been commenced or threatened, letters were written by the secretary of the bank in London to the new agent giving instructions and making inquiries with a view to obtaining information to

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wards, on the 20th of December, they amended their pleadings, under a judge's order, by adding a replication of fraud and a special equitable replication. These dates have been ascertained from an inspection of the nisi prius record.

(1) Law Rep. 3 Q. B. 91.

(2) Law Rep. 4 C. P. 602, 609.

(3) 4 B. & S. 73; 32 L. J. (Q.B.) 300.

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enable the bank to determine as to the mode of proceeding against the defendant, and reports were received from such agent in reply: and the question was whether these letters and reports were privileged from production. The Court of Queen's Bench held that all the correspondence was within the privilege, just as much as if they were communications between a party and his attorney. In the course of his judgment (1) Cockburn, C.J., says: "If a man writes a private letter to an agent or friend asking him to obtain information for him on a matter as to which he is about to engage or has already engaged in litigation, I doubt whether a discovery or inspection of the answer to that letter would be ordered by any of the learned judges in equity to whose decisions reference has been made; and I will not be a party to establishing such a precedent." And Blackburn, J. (1), says: "All the documents after a particular date fall within the principle of communications by an attorney or of matters done by and communications made through an agent of the attorney, or of matters which would have been done by an attorney but for the distance of the place occasioning the necessity of employing an agent. But there are several documents written previously to the date at which an attorney was consulted: the plaintiffs, being about to consult their attorney, write out and get from abroad these documents, which are rough notes from which a statement was to be made and laid before him. As to these we have a discretion, and I think we ought not to grant inspection." As was observed in *Woolley* v. *North London Ry. Co.* (2), there are cases where it has been held that information which may have been obtained in the ordinary course under apprehension of litigation must be disclosed, as in *Colman* v. *Trueman.* (3) It may be also that there is a wider rule where fraud is suggested, as is hinted in the case last cited, and by Blackburn, J., in *Chartered Bank of India* v. *Rich.* (4) These being the principles upon which the Courts have dealt with the subject, the question is as to how they are to be applied to the circumstances of the present case. The documents sought to be inspected are reports made to the company by their medical officer some time

(1) 4 B. & S. 81, 83; 32 L. J. (Q.B.) 300, 305, 306.

(2) Law Rep. 4 C. P. 602, 609.

(3) 3 H. & N. 871; 28 L. J. (Ex.) 5.

(4) 4 B. & S. at pp. 83, 84; 32 L. J. (Q.B.) at p. 306.

before the commencement of the action. Reliance is placed, on the part of the plaintiffs, on *Baker* v. *London and South Western Ry. Co.* (1), where production of reports of a similar description was ordered. It is to be observed, however, that the point now made on the part of the defendants was not raised there. The resistance to the production of the reports was not rested on the ground of impending litigation, but on the ground that "they were confidential communications made to the defendants by their agents or servants in the course of their duty,"—a ground which this Court in *Woolley* v. *North London Ry. Co.* (2) held to be untenable. Independently of that, the case was one of a peculiar character. The injured person had settled his claim with the company, and afterwards died, in consequence, as was said, of the shock he had sustained, and the action was brought by his executors. The Court considered that the ground of privilege failed; and it is difficult to see what other course they could have adopted. Furthermore, we are informed by counsel that the accord and satisfaction there set up was resisted on the ground of fraud. (3) If that be so, it makes the decision consistent with the other cases: because fraud being alleged in the settlement with the deceased, the reports might be material to shew what knowledge the company or their representatives had of the matters in question. I observe, too, that Cockburn, C.J., in his judgment, expressly states that he adheres to the decision in *Chartered Bank of India* v. *Rich.* (4) Therefore, as the principle clearly laid down in that case confines the rule to communications which are privileged on the ground that they have reference to impending or actual litigation, I think *Baker* v. *London and South Western Ry. Co.* (1) is distinguishable from the present case. There is nothing here to suggest that the reports in question were made otherwise than with a view to anticipated litigation. It has been said that the effect of the decision in *Baker* v. *London and South Western Ry. Co.* (1) is that, where the plaintiff has submitted to be examined by the medical officer of the company, there is an implied undertaking that any reports made by him shall be produced. I cannot, however, consider that there is any such implied under-

(1) Law Rep. 3 Q. B. 91.
(2) Law Rep. 4 C. P. 602.
(3) See ante, p. 148, note (4).
(4) 4 B. & S. 73; 32 L. J. (Q.B.) 300.

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taking. The nature of the reports is stated in the affidavits which must govern our decision; and these shew that they were made by a person who went for the purpose of examining the plaintiffs as to the nature and extent of the injuries they had received and the compensation they claimed, with a view of advising thereon and meeting the claim. Complaint had been made to the company, and the investigation took place with the view of compensating the plaintiffs. I think the facts clearly bring the case within *Chartered Bank of India* v. *Rich* (1) and *Woolley* v. *North London Ry. Co.* (2), which protects the party against the production of documents which are obtained with a view to impending litigation, and not within the exceptional case of *Baker* v. *London and South Western Ry. Co.* (3) The general rule is not confined to cases where litigation has actually been commenced, or to communications between the party and his legal advisers. I think this rule should be refused.

MONTAGUE SMITH, J. The question in this case is, whether the limitation to the right to have discovery and production of documents on the ground that they were obtained with a view to litigation or impending litigation applies to the reports in question: and I think the reports are within the limitation, and that we ought not to order the production of them.

The principle of the limitation will be found in the judgments of all the judges of this Court who took part in the decision of *Woolley* v. *North London Ry. Co.* (4); and, to avoid a change of words, I refer to what I said in that case. I said, as to the documents which the Court there held ought to have been produced, viz. reports made by certain officers of the company in the ordinary course of their duty,—"I think we may fairly infer that these reports would be made, whether there was any cause of action or not;" and I then stated that I understood the limitation to the right to be that, if the documents are produced for the purpose of assisting the party in an impending litigation, and to obtain advice, they are not to be produced; and I then referred to *Reid* v. *Langlois* (5) and *Steele* v. *Stewart* (6), which shew that, if

(1) 4 B. & S. 73; 32 L. J. (Q.B.) 300.
(2) Law Rep. 4 C. P. 602.
(3) Law Rep. 3 Q. B. 91.
(4) Law Rep. 4 C. P. 602, 612.
(5) 1 M'N. & G. 627.
(6) 1 Phil. 471.

the information is obtained not by, though for the attorney of the party, it is privileged from production. To these two cases in Chancery, I may now add the recent case of *Ross* v. *Gibbs*. (1) In that case, Stuart, V.C., says (1): "The privilege which exempts a communication from production is the privilege of the client, and not of the solicitor; and communications relating to the subject-matter of the suit, and furnished with a view to litigation, are as much protected upon principle when made by a lay agent to a litigant as they are when made by a solicitor. I account for the frequent reference to the solicitor in the authorities, to his being treated as the person who conducts the litigation; but, in reality, it is the plaintiff who conducts the litigation, though he conducts it through his solicitor." The Vice-Chancellor in this passage places the principle of the privilege on broad, intelligible, and, I apprehend, sound grounds: and I confess I think this limitation to the general right to require production ought in its application to be liberally construed in favour of the limitation.

Now, the documents in question seem to me clearly to fall within the limitation. They are the reports of a medical man sent by the defendants to examine the plaintiffs, not only after the cause of action had arisen, but after a claim had in effect been made, and when the defendants were in immediate peril of an action, and for the sole object of reporting his opinion on the subject-matter of the claim, for the guidance of the defendants and their legal advisers. I confess I can draw no other inference than that this report was obtained with a view to impending litigation, and for the purpose of assisting the defendants and their advisers in dealing with it; and, that being so, I think we ought not to order the production.

We were pressed with the decision of the Court of Queen's Bench in *Baker* v. *London and South Western Ry. Co.* (2) I should be sorry to decide in opposition to the judgment of a co-ordinate Court; but the circumstances of that case differ from those of the present. There, two persons, a medical man and an attorney's clerk, were sent to negotiate a settlement of the claim, which settlement was afterwards impeached. It was not contended

(1) Law Rep. 8 Eq. 522, 524; 39 L. J. (Ch.) at p. 63.

(2) Law Rep. 3 Q. B. 91.

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in that case in opposition to the production of the documents that they were obtained with a view to impending litigation; but the case was argued on other grounds. It is not necessary to say how far the ground of decision in that case ought to prevail: but it seems to me that it does not govern the present case, where the object of the examination was such as I have before pointed out. It may be observed that plaintiffs need not consent to such a medical examination as took place in this case, if they do not think it expedient, and may impose terms on their assent, as, that they shall be permitted to see the report and opinion of the medical man. But if, without any terms, the examination is made, as in this case, with a view to advice or evidence in litigation, it seems to me that the protection from discovery is not displaced by the mere fact that the plaintiff consents to be examined.

BRETT, J. I entertain a strong opinion that the rule laid down by this Court in *Woolley* v. *North London Ry. Co.* (1) is a good and wholesome one. The test there suggested by my Brother Montague Smith is undoubtedly a sound one, though it is not the only one. The decision of Vice-Chancellor Stuart in *Ross* v. *Gibbs* (2) is quite in accordance with that case; and the only question here is as to the application of the principle. The medical man was sent by the defendants to examine the plaintiffs and to report the result to them, in order that the defendants might determine whether they should resist or yield to the claim about to be made upon them. The reports so made clearly fall within the rule in *Woolley* v. *North London Ry. Co.* (1), and are privileged.

Rule refused.

Attorneys for plaintiffs: *Martineau & Reid.*
Attorneys for defendants: *Baxter, Rose, Norton, & Co.*

(1) Law Rep. 4 C. P. 602. (2) Law Rep. 8 Eq. 522.

[IN THE EXCHEQUER CHAMBER.]

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Feb. 7.

FOLEY *v.* THE UNITED FIRE AND MARINE INSURANCE COMPANY OF SYDNEY.

Marine Insurance—Insurable Interest—Chartered Freight—Policy "at and from"—Inception of Risk.

A vessel, when about to proceed on a voyage with cargo from Calcutta to Mauritius, was chartered "to proceed with all convenient speed on her present voyage to Mauritius, and, having discharged her cargo there," to "sail and proceed to Akyab, &c., and load from the charterers a cargo of rice for a port in the United Kingdom." Subsequently the owner insured the freight to be earned under the charterparty by an insurance "at and from Mauritius to rice ports, and at and thence to a port of discharge in the United Kingdom," "on chartered freight, valued at 1150*l*." The vessel was afterwards lost at Mauritius, by a peril insured against, before she had discharged the whole of her cargo there:—

Held, upon the authority of *Thompson* v. *Taylor* (6 T. R. 478) and *Barber* v. *Fleming* (Law Rep. 5 Q. B. 59), that the risk on the policy attached upon the arrival of the vessel at Mauritius, and that the assured was therefore entitled to recover.

DECLARATION in the ordinary form upon a policy of insurance, for a total loss of the chartered freight of the ship *Edmund Graham*. Money counts.

Pleas: 1. That the plaintiff did not cause the policy to be made, nor did the defendants become insurers. 2. That the plaintiff was not interested in the subject-matter of insurance. 3. That the ship was not in good safety at Mauritius. 4. That the subject-matter of insurance was not lost by the perils insured against. 5. That, at the time of the loss, the risk in the policy had not commenced, and the policy had not attached in respect of the subject-matter of insurance. 6. As to the money counts, payment into Court of 84*l*.

The plaintiff was the owner of the ship *Edmund Graham*, and on the 31st of December, 1867, when the *Edmund Graham* was about to sail with a cargo from Calcutta to Mauritius, he chartered her to Wattenbach, Heilgers, & Co., agents for merchants at Akyab, for a further voyage from Mauritius to rice ports.

The charterparty provided that the *Edmund Graham*, then lying in the river Hooghly, and being tight, &c., should "with all

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convenient speed sail and proceed on her present voyage to Mauritius, and, having discharged her cargo there, shall with all convenient speed sail and proceed to Akyab for orders to load there from the charterers a full and complete cargo of rice in bags, which the charterers bind themselves to ship, and, being so loaded, shall therewith proceed to Cork or Falmouth for orders to discharge at a safe port in the United Kingdom, or on the continent between Havre and Hamburg, and deliver her cargo on being paid freight. Freighters to have the option of cancelling the charterparty, if the vessel does not arrive at Akyab on or before the 1st of May, 1868."

On the 10th of January, 1868, the *Edmund Graham* sailed from Calcutta, with a cargo of rice in bags, and arrived at Port Louis, Mauritius, on the 20th of February, 1868, and was there anchored in good safety, and immediately proceeded to discharge her cargo.

On the 2nd of March, 1868, the plaintiff effected the policy of insurance declared upon on the freight of the *Edmund Graham*. The insurance was "at and from Mauritius to rice ports, and at and thence to a port or ports of call and [or] discharge in the United Kingdom, or on the continent between Havre and Hamburg, both inclusive, on chartered freight, valued at 1150*l*."

On the 11th of March, 1868, when about 6500 bags of rice had been discharged from the vessel, and about 9000 bags, residue of the cargo, were still on board, there was a violent hurricane at Port Louis, which drove the ship ashore, and she became a total wreck.

The Lord Chief Justice told the jury that the policy had attached at Mauritius at the time of the loss, and that the defendants were liable in respect thereof upon the policy.

The defendants' counsel tendered a bill of exceptions to this ruling.

Quain, Q.C. (*J. C. Mathew* with him), in support of the exceptions. If this had been a policy on ship, it may be that the risk would have attached on her arrival at Mauritius in good physical safety: 1 Arnould on Insurance, 3rd ed. 388. But, on this policy on chartered freight, the risk did not attach until the ship was ready to proceed on the voyage insured: 1 Arnould, 3rd ed. 412, referring

to *Tonge* v. *Watts*. (1) It appears from the charter under which the freight insured was to be earned, that there was an existing charter under which the *Edmund Graham* was about to proceed from Calcutta to Mauritius; and this charter was intended to take her up from the termination of that adventure at the latter port, and the policy to attach at the same moment. At the time of the loss of the ship, no preparation had been made for proceeding on the voyage to Akyab; there were still 9000 bags of rice unshipped. Suppose this had been a policy on goods at and from Mauritius, the policy clearly would only have attached at Mauritius when the ship was ready to receive cargo and cargo was purchased and ready to load. Speaking of chartered freight, Mr. Arnould says (1 Arnould, 3rd ed. 419): "A policy on freight attaches, not from the loading goods on board on the voyage insured, but from the ship's breaking ground on the voyage on which freight is to be earned under the charterparty." For this *Thompson* v. *Taylor* (2), *Horncastle* v. *Suart* (3), and *Davidson* v. *Willasey* (4), are cited. Again, he says, at p. 421: "The policy does not attach unless there be an inception of the voyage insured;" and at p. 423: "When that which is denominated freight is in fact the chartered hire for the use of the ship on a certain voyage, the right to this stipulated hire begins immediately the ship breaks ground on the agreed voyage, quite irrespective of any question touching cargo." Here, the voyage was not in any sense commenced at the time the loss happened; the ship had not in fact completed her voyage to Mauritius. The interest of the assured in the chartered freight, under these words "at and from," did not commence with the arrival of the ship at Mauritius, for then she was not in a condition to earn it, and she never was so.

[LUSH, J. According to the argument, the word "at" would have received two different meanings, if the policy had covered both ship and freight.]

Yes. The ship was at Mauritius: but, if she was not there ready to receive cargo or to proceed on the chartered voyage, she was not there for the purpose of earning the chartered freight. In *Barber* v. *Fleming* (5), the voyage covered by the policy had

(1) 2 Str. 1251.
(2) 6 T. R. 478.
(3) 7 East, 400.
(4) 1 M. & S. 313.
(5) Law Rep. 5 Q. B. 59.

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commenced, though that portion of the voyage in which the freight was to be earned had not. The ship, being at Bombay, was chartered for a voyage "from Howland's Island to a port in the United Kingdom, for a full cargo of guano:" the owner insured her "at and from Bombay to Howland's Island," while there, and thence to a port in the United Kingdom, "on freight, chartered or otherwise, valued at 3600*l.*:" the ship sailed in ballast from Bombay, and, while on her voyage to Howland's Island, was lost: and it was held that the plaintiff was entitled to recover. Blackburn, J., in the course of his judgment, after referring to Phillips on Insurance, § 335 (1), expressly guards himself "against being supposed to say in the present case, that, if the owners had been carrying freight from Bombay to Howland's Island, that might not raise a different question." Here, the defendants have nothing to do with the voyage from Calcutta to Mauritius. The ground of the decision in *Barber* v. *Fleming* (2) was, that, as the ship had sailed from Bombay in ballast, with the sole object of going to Howland's Island in order to earn the chartered freight, the interest had attached. Here, however, the vessel did not go to Mauritius to earn the chartered freight, but to deliver another cargo: and this distinguishes the case from *Thompson* v. *Taylor* (3), and from *Horncastle* v. *Suart* (4), which, though decided upon the authority of *Thompson* v. *Taylor* (3), is also distinguishable from it. Speaking of *Horncastle* v. *Suart* (4) in *Forbes* v. *Cowie* (5), Lord Ellenborough says: "There, however, there was one charterparty for the outward and homeward voyage, and the freight was entire. That is the only ground upon which the decision can be sustained." There is no such entirety of voyage here. In *Davidson* v. *Willasey* (6), one half of the homeward cargo was already on board, and the remainder on shore ready to be shipped, at the time of the loss.

The principle is very clearly stated in 1 Parsons on Insurance, 172, et seq. And, at p. 182, he puts this case: "If a ship, be chartered to go from one port to a second, and from the second to a third, and from the third to a fourth, and so on, and the charterer

(1) Law Rep. 5 Q. B. at p. 72.
(2) Law Rep. 5 Q. B. 59.
(3) 6 T. R. 478.
(4) 7 East, 400.
(5) 1 Camp. 520, 521.
(6) 1 M. & S. 313.

is to pay one whole freight for the whole round voyage, and the owner insures this whole freight, the insurable interest of the owner in the whole begins when the ship sails under this charter on the first passage. (1) We think this would be so whether she had goods on board then or not. Nor can we see good reason for holding that this insurance would not attach for the whole round voyage, when the ship sails in ballast for the port at which the charter is to commence:" *Robinson* v. *Manufacturers' Insurance Co.* (2) And in a note in p. 182 he refers, in confirmation of the general doctrine, to a dictum of Homer, J., in *Riley* v. *Hartford Insurance Co.* (3) There was no entire voyage here from Calcutta all round at one freight. The voyage, the freight for which was insured, never commenced.

Sir G. Honyman, Q.C. (*Watkin Williams* and *Cohen* with him), contrà, was not called upon.

KELLY, C.B. The plaintiff has insured certain chartered freight "at and from Mauritius to rice ports, and at and thence to a port in the United Kingdom." A total loss has occurred, the ship having been by a peril of the sea destroyed some little time after her arrival at Mauritius, but before the cargo which she had brought from Calcutta was completely discharged. It is now insisted on the part of the insurers that the loss is not within the policy. The question turns upon the construction of the words "at and from." Mr. Quain has contended that the interest in this chartered freight, and the risk under the policy, must be taken to attach only on the commencement of the voyage insured, or at the earliest from the time the vessel had discharged the cargo which she had brought to Mauritius. The first question is, whether that is the true construction of this policy. It requires no argument to shew that, where freight is insured "at and from" a given port, it is insured as long as the ship is at that port. The case, however, is put upon another ground. It is said that the interest only attaches on a policy like this,—that the risk only attaches, when the voyage on which the freight is to be earned has commenced: and it is insisted that the risk here could not commence before the

(1) Citing *Thompson* v. *Taylor*, 6 T. R. 478.

(2) 1 Met. (American) 143, 146.

(3) 2 Conn. (American) 368.

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cargo was discharged. If that argument be correct, it amounts to this, that there never can be an effective insurance on freight to be earned on a voyage from a given port, until the ship is in a condition to receive goods on board. But we find a long series of cases, beginning with *Thompson* v. *Taylor* (1) and coming down to the recent case of *Barber* v. *Fleming* (2), which conclusively establish the contrary. The real doctrine is this: if the voyage by means of which the chartered freight is to be earned has commenced, there is an inchoate interest in the freight, and the risk attaches, provided the language of the charter, taken with the policy, will warrant that view of the case. In *Barber* v. *Fleming* (2) the plaintiff chartered his ship *Cambodia*, then lying at Bombay, for a voyage "from Howland's Island (one of the Chincha Islands) to a port in the United Kingdom," for a full cargo of guano, freight to be paid at port of discharge. He effected an insurance with the defendant, "at and from Bombay to Howland's Island, while there, and thence to a port in the United Kingdom, on freight, chartered or otherwise, valued at 3600*l.*, in the ship *Cambodia*," with liberty to touch and stay at any ports. The ship sailed from Bombay, in ballast, for Howland's Island, intending to call at a port in New Zealand for water. She got on shore on the coast of New Zealand, and was lost. The Court of Queen's Bench held, that, as the ship had sailed in ballast from Bombay, with the sole object of going to Howland's Island in order to earn the freight under the charter from thence to the United Kingdom, the interest in the chartered freight had commenced, and the plaintiff was entitled to recover for a total loss. There, it is clear, the vessel could only commence earning the freight at Howland's Island; and yet the plaintiff was held to have an insurable interest in the chartered freight, which was covered by the policy. It is true that in that case the ship sailed in ballast from Bombay; whereas here the vessel sailed with cargo from Calcutta to Mauritius. But the question is, what was it that gave the owner the inchoate right to the chartered freight? *Thompson* v. *Taylor* (1) is quite conclusive. There, a ship was chartered from London to Teneriffe, there to take on board a certain number of pipes of wine, and proceed therewith to Barbadoes, for which the owner was to receive "for the freight and

(1) 6 T. R. 478. (2) Law Rep. 5 Q. B. 59.

hire of the ship for the said voyage," a certain sum per pipe. The ship sailed on the voyage, and was captured before she reached Teneriffe; and yet it was held that a policy on freight "at and from London to Teneriffe, at and from thence to any of the West India Islands (Jamaica excepted)," &c., attached from the sailing of the ship from London. There, as here, the freight could not begin to be actually earned until the arrival of the ship at the port first named. Substitute Calcutta for London, and Mauritius for Teneriffe, and the two cases are identical. Lord Kenyon there puts the decision upon clear and intelligible grounds. After alluding to *Tonge* v. *Watts* (1), he says (2): "The property against the loss of which the assured wished to be indemnified is that which he had a right to receive under the charterparty; and it seems now admitted that, if the contract had its inception, if anything were done under it by the plaintiff who let his ship to hire, his right to freight commenced. That depends on the words of the charterparty, which are 'that the ship should on or before the 9th of February depart out of the river Thames and directly proceed to Port Orotava in Teneriffe, and after the ship should be ready to receive goods lie twenty days and load and receive on board her from Messrs. Cox 500 pipes of wine, and then sail and proceed to Barbadoes.' Now, it seems to me that the argument on behalf of the plaintiff is well founded, that there was an inception of this contract by the owner of the ship; for the ship did sail from the Thames towards Teneriffe, and was captured in the course of that voyage." That brings us to consider what are the terms of this charterparty. It is agreed that the ship, then at Calcutta, "shall sail and proceed on her present voyage to Mauritius, and, having discharged her cargo there, shall with all convenient speed sail and proceed to Akyab for orders to load there," a cargo of rice for the United Kingdom, for certain freight payable on delivery. Now, it is the express contract in the charterparty that the voyage shall commence at Calcutta: and the inchoate right to the chartered freight attached when the voyage from Calcutta commenced. It would be very prejudicial to the interests of owners of ships if it were otherwise. The owner of a ship at Calcutta may have incurred considerable expense in putting

(1) 2 Str. 1251. (2) 6 T. R. at p. 481.

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his ship in a condition to proceed (as here) to Mauritius, and from Mauritius to the rice ports, and thence home. The policy was intended to indemnify him against the loss of that outlay before the arrival of the ship at the port where the freight was to be earned. I think it is no objection to his right to recover, that the loss took place before the whole of the Calcutta cargo was landed at Mauritius. The words "at and from" in their ordinary signification include the whole period the ship was actually at Mauritius. It was during that period that the loss occurred. I think that was a loss within the meaning of this policy, and that the charge of the Chief Justice of the Common Pleas was right, and the plaintiff entitled to judgment.

MARTIN, B. I am of the same opinion. The question turns upon the meaning of what appear to me to be very plain and simple words. The risk insured by this policy is "at and from Mauritius to rice ports, and at and thence to a port or ports of call and discharge in the United Kingdom, &c., on chartered freight, valued at 1150*l*." The policy states what are the risks insured against, and the loss to the owner is by one of those risks. Now, to ascertain what the chartered freight was, we must have recourse to the charterparty. By that it is agreed that the ship, being tight, &c., "shall with all convenient speed sail and proceed on her present voyage (from Calcutta) to Mauritius, and, having discharged her cargo there, shall with all convenient speed sail and proceed to Akyab for orders to load there, and shall load from the charterers a full cargo of rice, . . . and proceed therewith to Cork, &c., for orders to discharge," &c. Freight was to be paid on delivery, for that service. The plaintiff meant to insure, and the defendants meant to indemnify him against the loss of, that chartered freight. Now, what has occurred? The ship sailed from Calcutta to Mauritius, and while there the ship was lost. Why should the plaintiff not be indemnified against the freight which he has thus lost? Apart from the fact that a portion of the cargo deliverable at Mauritius still remained undelivered at the time of the loss, this seems to me to be as plain a case as can be. If any authority were wanting, that of Cockburn, C.J., in *Barber* v. *Fleming* (1) appears to me to be quite conclusive. He

(1) Law Rep. 5 Q. B. 59, 67.

says: "From the moment that a vessel is chartered to go from port A. to port B., and at port B. to take a cargo and bring home that cargo to England, or to take it to any port, which I will call port C., for freight, the ship-owner, having got such a contract, has an interest unquestionably in earning the freight secured to him by the charter; and, having such an interest, it is manifest that that interest is insurable; and he loses the freight and benefit of his charter just as much by the ship being disabled on her voyage to the port at which the cargo is to be loaded and from which it is to be brought, as he would lose it by the disaster arising from the perils insured against between the port of loading and the port of discharge. It is, therefore, an appreciable, tangible interest, and I entertain no doubt it is an interest that can be insured. It is a fallacy to say the freight is earned simply by bringing the cargo from the port of loading to the port of discharge; the freight is earned by the whole voyage which it is necessary to make to fetch the cargo and bring it home." I entirely concur in every word of that. It is both good law and good sense. In all probability, the fact was that the owners here were already insured from Calcutta to Mauritius; so that, if they had insured by this policy the freight for the entire voyage, a portion would have been insured twice.

MELLOR, J. I am entirely of the same opinion. Having listened to the reasons given by the Lord Chief Baron and my Brother Martin, it seems to me to be so plain that there is no real foundation for Mr. Quain's argument, that I do not think it necessary to add a word.

LUSH, J. I am of the same opinion. The question is, when did the risk upon this policy attach? The ship was chartered to proceed from Calcutta to Mauritius, and, having discharged her cargo there, was to go to the rice ports and there load a cargo of rice for the United Kingdom, for a certain freight payable on delivery. The policy describes the risk to be "at and from Mauritius to rice ports, and at and thence to a port of discharge in the United Kingdom;" and the interest insured is "chartered freight, valued at 1150*l*." The vessel was lost after her arrival at Mauritius, and after part of her cargo had been discharged, but before the

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residue was unshipped. Mr. Quain contends that the word "at" is to receive some qualification; and that, because at the time of her loss the vessel was not in a state of complete readiness to proceed at once to Akyab, the risk intended to be covered by the policy had not attached. He has cited no authority for that position; and I am at a loss to discover any principle upon which it can be sustained. The vessel was at Mauritius, and in the course of prosecuting the voyage described in the charterparty. The only question is, whether the loss of the ship prevented the plaintiff from earning the freight. That brings it to this, whether the plaintiff had an insurable interest in the subject-matter of insurance, viz. the chartered freight. So long as the earning of freight is a mere matter of speculation, there is no insurable interest. But here the freight was already secured: it was chartered freight. The vessel was therefore as much in the course of the prosecution of the voyage at the time of the disaster as if the cargo which she carried from Calcutta had been fully discharged. Mr. Quain admits that if the entire cargo had been discharged, the loss would have been a loss within the terms of the policy. I must confess I do not see why the ship was not as much engaged in the prosecution of her voyage as if she had actually left Mauritius. What she was doing was preparatory to her voyage to Akyab. I think the chartered freight on that voyage was clearly an insurable interest, and that the plaintiff has been prevented from earning it by one of the perils against which the policy was intended to insure him.

HANNEN, J. I have nothing to add to what has fallen from the rest of the Court.

CLEASBY, B. Nor have I.

Judgment for the plaintiff.

Attorneys for plaintiff: *Thomas & Hollams.*
Attorneys for defendants: *Parker & Clarke.*

VICKERY AND WIFE *v.* THE LONDON, BRIGHTON, AND SOUTH COAST RAILWAY COMPANY.

1870. *Feb.* 23.

Taxation of Costs—Writ of Inquiry—Fees to a "Good Jury."

A judge's order was obtained by the plaintiffs for a "good jury," on an inquiry before the Secondary, in an action against a railway company for negligence, and the sheriff, in accordance with the uniform practice since the passing of the 6 Geo. 4, c. 50, returned a jury selected from the list of special jurors. They were paid each one guinea; and the master, on taxation, allowed the payment:—

Held, that such payment was reasonable and sanctioned by practice, and that it was properly allowed by the master.

5 Ex 201, 4

ACTION against the London, Brighton, &c., Ry. Co. to recover damages for injuries sustained by the plaintiff's wife through the negligence of the defendants' servants. The defendants suffered judgment to go by default; and, on the trial of a writ of inquiry before Mr. Secondary Potter, the damages were assessed at 180*l.*

On taxation of the plaintiffs' costs, the master allowed the fees, briefs, &c., of two counsel, and also a payment of 12*l.* 12*s.* to the jury, on the ground that they were a "good jury" under a judge's order, selected from the list of jurors usually summoned to serve on special juries.

Lopes, Q.C., in Hilary Term, obtained a rule nisi to review the taxation, on the grounds that two counsel were never allowed on a writ of inquiry, and that the payment of 12*l.* 12*s.* to the jury was excessive and ought not to have been allowed.

Jan. 31. *Prentice, Q.C.*, and *Thesiger*, shewed cause. The master, having all the circumstances of the case before him, has, in the exercise of his discretion, thought it reasonable that two counsel should be employed.

[*Lopes* intimated that he abandoned that point.]

Secondly, as to the allowance to the jury; for forty-five years past it has been the practice to pay a fee of one guinea each to jurymen summoned under an order for a "good jury," they being in fact selected from the class of persons who usually are summoned to serve on special juries: and it is now too late to object to such allow-

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ance. They referred to the statutes 3 Geo. 2, c. 25, 24 Geo. 2, c. 18, 6 Geo. 4, c. 50, ss. 34, 35, 52, and 7 Wm. 4 & 1 Vict. c. 55; Reg. Gen. 23 Car. 2, r. 48, H. 2 Wm. 4, r. 101, and H. 16 Vict. (1853) r. 40; 1 Tidd's Practice, 9 ed. 787; 2 Archbold's Practice, 11th ed. 987; 2 Lush's Practice, 2 ed. 798; Gray on Costs, 365; *Wilkinson* v. *Malin* (1); *Price* v. *Williams.* (2)

Lopes, Q.C., and *Mangles*, in support of the rule. The 6 Geo. 4, c. 50, does not apply to "good juries," and they are not upon the same footing as special jurymen. A "good jury" is not like a special jury: there is no nominating or striking or reducing. It would be assuming the functions of parliament to hold that the mere practice of paying such persons the same fees that are paid to special jurors gives a right to impose such a charge upon the unsuccessful litigant. In *Calvert* v. *Gordon* (3), the Court say: "A good jury is not a special jury within the meaning of the several Acts on the subject of juries; and the master now certifies that both before and since the late statute (4), the practice had been invariably to disallow the extra expense of a good jury upon the execution of a writ of inquiry." None of the authorities cited on the other side say anything about the amount of fees payable to the jurors.

BOVILL, C.J. It is very desirable that there should be some settled rule upon the subject of these fees, and we will take time for deliberation.

Cur. adv. vult. (5)

(1) 1 C. & M. 237.

(2) 5 Dowl. 160.

(3) 3 M. & R. 124, 129.

(4) 6 Geo. 4, c. 50.

(5) The following certificates were referred to during the argument:—

From Mr. Secondary Potter. "Previously to the passing of the Jury Act, 6 Geo. 4, c. 50, there was a list of respectable tradesmen in constant attendance at the sheriff's office to try all writs of inquiry, which writs were then taken daily. If the parties required a better jury, an order was obtained for a *good jury*, and the jurors were of the same class of persons as formed the common jury trying causes in the superior Courts. After the passing of the Jury Act, the jury in constant attendance at the sheriff's office was discontinued, and all juries were composed of common jurymen taken out of the same list of persons as composed the common juries for the superior Courts, and consequently a good jury, under that name, no longer existed. Afterwards, when the sheriffs received an order for a *good jury*, it was treated as an order for a special jury, and the jury were nominated and treated as a

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Feb. 23. The judgment of the Court (Bovill, C.J., Montague Smith, and Brett, JJ.) was delivered by

BOVILL, C.J. An application was made for a review of the taxation of costs in this case, first, with reference to the number of counsel allowed by the master, which point was disposed of in the course of the argument; and secondly, on the ground that the master had allowed the costs of a good jury, and the fees paid to the special jurors upon the execution of a writ of inquiry.

The defendants had suffered judgment to go by default; and the plaintiffs then applied for and obtained a judge's order for a good jury. The sheriff accordingly summoned such jury from the special jury list, and the sum of one guinea was paid to each juryman, which payment has been allowed by the master.

The practice of ordering a good jury existed long before the passing of the Acts which regulate special juries. Those statutes do not relate to writs of inquiry; and by the rules of Court a good jury cannot be had without the order of a judge. The judge exercises his discretion as to whether it is a fit case for a good jury; and, if he makes the order, it has long been settled that the costs of the good jury are to be allowed on taxation. *Wilkinson* v. *Malin*. (1) The principal object in obtaining an order for a good jury since the Act of 6 Geo. 4, c. 50, has been, that the jury should be selected from the special jury list, instead of from the common jury list; see *Price* v. *Williams* (2); and the practice of the Secondaries in the city of London ever since the passing of that Act has been, when such an order is made, always to select

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special jury, and in Court received one guinea each in each case. This has been the invariable practice in London since the passing of the Jury Act, no matter in which of the Courts the action was brought, and until the present time, so far as I understand, has always been allowed."

From the Undersheriff of Middlesex. "The practice in Middlesex with regard to good juries is identical almost with that of the city of London, viz. that a good jury has usually been nominated and summoned from the special jury list, and that, in all cases where a writ of inquiry is executed before such a good jury, they receive one guinea each, no distinction being made in this respect between a good and a special jury,—unless the party who obtained the order chooses to have the jury selected from the common jury list, in which latter case they receive 10*s*. 6*d*. each."

(1) 1 C. & M. 237.

(2) 5 Dowl. 160.

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the jury from the special jury list, and the jurymen have invariably been paid one guinea each for their attendance. The practice in Middlesex has been somewhat different, as the under-sheriff has given the party who obtained the order, the option of having the jury selected from the special jury list, or from amongst a superior class of tradesmen on the common jury list. If the jurymen were selected from the common jury list, they were paid 10*s.* 6*d.* each; but, if taken from the special jury list, they have, as in the city of London, invariably been paid one guinea. In the present case the jury were selected from the special jury list, and were paid one guinea each, in accordance with that practice.

The usual fee of a special juror has undoubtedly been one guinea ever since the passing of the Act of 6 Geo. 4, c. 50, which required a separate list to be made of special jurors; and by the 35th section of that Act it is provided that no juror shall be allowed to take more than the judge shall think just and reasonable, and which shall not exceed 1*l.* 1*s.*, except in case of a view; and this statute, therefore, seems to recognize one guinea as a proper fee.

If the practice had existed and been sanctioned by the Courts only since the passing of that Act (a period of nearly forty-five years), we should have been very loth to interfere with it; but, upon looking to the earlier statute of 24 Geo. 2, c. 18, it is clear that the fee of one guinea to special jurors was at that time also recognized by the legislature; so that there is every reason to believe that for upwards of one hundred years the fee of one guinea has been adopted and approved by the Courts. In the Act of 24 Geo. 2, c. 18, after referring to the previous statute as to special juries, s. 2 begins with a recital that complaints were frequently made of the great and extravagant fees paid to jurymen returned under the former Acts, and then prohibits the taking of more than the judge shall think just and reasonable, not exceeding one guinea, in the same terms as the subsequent Act of 6 Geo. 4, c. 50.

The previous statute relating to special jurors was the 3 Geo. 2, c. 25; and s. 15 of that Act, after reciting that doubts had been conceived touching the power of the Courts to order special jurors to be summoned, except for trials at Bar, expressly empowers the Courts to order juries to be struck for the trial of issues in such manner as special juries have been and are usually struck in such

Courts respectively upon trials at Bar. In the 3 Geo. 2, c. 25, there is no mention of the fees to be paid to the special jury; but, from the recital in the Act of 24 Geo. 2, c. 18, s. 2, it seems probable that the payments exceeded one guinea to each special juror at that time.

Long before these Acts it was the practice to summon special juries for trials at Bar (where all trials originally took place), and probably they were also summoned for trials at nisi prius: see *Philpot* v. *Feeler*. (1) And from the case of *Rex* v. *Smith* (2), in the reign of George I., it would seem that this was done by a rule for a good jury, and that the persons summoned were often gentlemen who were in the commission of the peace. There can be little doubt that the special juries were composed of the principal freeholders: and in the 7th edition of Trials per Pais, edited by Giles Duncombe in 1739, p. 90, it is stated that it was the practice of the Courts to order "the prothonotary to choose forty-eight out of the sheriff's book of freeholders of the most substantial men of the county." It also appears from Salk. 405, pl. 1 and 2, that, in the 8 Wm. 3, the practice of striking a special jury from the freeholders' book was very much the same as it is at present.

What was the precise date and origin of the fees, either to special jurors or common jurors, it is difficult to ascertain.

In Smith's Commonwealth, which was written in the early part of the reign of Queen Elizabeth, and which is referred to in the interesting work of Mr. Forsyth upon Trial by Jury, it is stated in chap. 18 that, "The party with whom they have given their sentence giveth the enquest their dinner that day most commonly; and this is all they have for their labour, notwithstanding that they come, some twenty, some thirty or forty miles, or more, to the place where they give their verdict: all the rest is at their own charge."

In *The Duke of Richmond* v. *Wise* (3), 23 Car. 2, which was tried at Bar, and where a motion was made to set aside the verdict on account of the jury having been entertained by the successful party, it is said by the Court to have been usual at the assizes for the jury to receive a collation after verdict given, from him for whom they find, and that it would not avoid the verdict, but that such practice ought not to be."

(1) Cro. Jac. 672. (2) 1 Stra. 265.

(3) 1 Vent. 124.

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It appears, however, from Powell's Attorney's Academy, published in 1623, that at *that* time the ordinary and usual fee to each common juryman was 8*d.*, and to each talesman 4*d.* At p. 141, under the heading of "Fees at Nisi Prius at Guildhall," are the following entries:—"To the jury per piece, being of the number in hab. corp., 8*d.*" "To the rest that come in by the tales, per piece, 4*d.*" And at p. 142, it is stated to be the same "upon a nisi prius in the country." But there is no trace of what the fees were to special jurors.

It is clear, also, that, in 1658 and in 1682, the practice was to pay the special jury upon a trial at Bar: see *Hunt* v. *Hollis* (1), where the jury came from Dorsetshire, and *Caldicot* v. *Earl Pembroke* (2), where they were summoned from Wiltshire: and in *Rex* v. *Inhabitants of Hermitage* (3), it appears at p. 242 of the report that the prosecutors paid 65*l.* to the jury, who came up from Dorsetshire in very bad weather. In the 5th edition of Trials per Pais, published in 1718, after speaking of certain jurors being fined for taking money after their verdict, it is stated that "the practice is otherwise at this day; if it were not, the Middlesex juries would not so court the bailiffs to return them especially to trials at Bar, where 5*l.* a man is a frequent gratuity, sometimes more." It is not improbable that, after the passing of the Act of 3 Geo. 2, c. 25, a similar practice as to the fees began to prevail with the special juries at nisi prius, and that this may have led to the enactment in the 24 Geo. 2, c. 18, limiting the payment to one guinea, which is repeated in the later Act of 6 Geo. 4, c. 50.

In the 1st edition of Bacon's Abridgment, published in 1736, and in the subsequent editions, title *Juries* (L), "When and by whom to be paid," it is said: "Jurors in all civil causes are to be paid for their trouble and attendance, and the quantum is to be proportioned according to the distance of place, badness of the weather, &c.: but, if they take any money or other reward for giving a verdict, they are not only punishable at common law by fine and imprisonment, but to a decies tantum given by the statute of 38 Edw. 3, c. 12, i.e. a forfeiture of ten times as much as he hath taken. But, if some of the jurors appear, and the trial

(1) 2 Sid. 77. (2) 2 Show. 248.
(3) Carth. 239.

goes off pro defectu juratorum, those who appeared are not to be paid; for, nobody has received any benefit from their attendance, and, consequently, not obliged to make them any recompense. But, where a cause was appointed for trial at the bar of B. R., by a jury of Wilts, and a venire returned, and the jury summoned, but before the day the parties agreed, and, the summons not being countermanded, several of the jury appeared; it was ordered, on motion, that the attorneys on both sides should pay them. So, if the jury find a special verdict, the charges of the jury shall be equally borne by both parties." And in the margin there is the following note:—"In strictness, on a trial at nisi prius in the same county, they are only entitled to 8*d.*, and to 5*l.* on a trial at Bar, where they come out of a foreign county;" citing Trials per Pais, 62, 216. And in Impey's Practice of the Common Pleas, 4th ed., published in 1794, at p. 398 (1) there is the following passage:—"I understand the talesmen are now paid the same as the special jury; and so they are in the King's Bench. Lord Mansfield said they served for a special purpose, therefore they ought to be paid the same as the special jurors; formerly, it was otherwise."

So far back as living memory extends, the fee to a special juryman has been a guinea; and that fee appears to have been recognized by Acts of Parliament and sanctioned by the Courts. It is true that it seems to depend upon usage: but many similar payments, and most important rights and privileges, have no other foundation than the usage and practice of the Courts; and, the payment in question being only a just and reasonable remuneration to the jury for their labour and services, we are of opinion that it may and ought to be sanctioned, as it has hitherto been. No authority has been produced to the contrary; and we are of opinion that the fees in this case were properly paid, and that the amount of them and also the other costs of the jury were properly allowed.

The rule was moved as an experiment, and must be discharged with costs.

Rule discharged, with costs.

Attorney for plaintiffs: *A. S. Edmunds.*

Attorneys for defendants: *Baxter, Rose, Norton, & Co.*

(1) 7th ed. p. 348.

Jan. 31. JOHN HILL, AND ANOTHER, PETITIONERS; SIR ROBERT PEEL, BART., AND SIR HENRY LYTTON BULWER, KNT., RESPONDENTS.

ROBERT RICHARD BROAD AND ANOTHER, PETITIONERS; ROBERT NICHOLAS FOWLER AND EDWARD BACKHOUSE EASTWICK, RESPONDENTS.

ALFRED PEGLER, PETITIONER; THE RIGHT HON. RUSSELL GURNEY AND PETER MERRICK HOARE, RESPONDENTS.

Parliamentary Elections Act, 1868 (31 & 32 *Vict. c.* 125)—*Petition—Taxation of Costs—Counsel's Fees—Consultations—Preliminary Expenses—Instructions for Brief.*

By s. 41 of the Parliamentary Elections Act, 1868, the costs of a petition are to be defrayed by the parties to the petition in such manner as the Court or judge may determine, and are to be taxed "according to the same principles as costs between attorney and client are taxed in a suit in Chancery:"—

Held, on a general order for costs under this section that the parties entitled under the order were entitled to an indemnity for all costs that were reasonably incurred by them in the ordinary course of matters of this nature, but not to any extraordinary or unusual expenses incurred in consequence of over caution as to any particular case, or from considerations of any special importance arising from the position or character of either of the parties, or any special desire on his part to insure success. Such extraordinary costs as an attorney would not be justified in incurring without distinct and special instructions from his client ought not to be allowed; nor the costs of purely collateral proceedings upon which a party has failed; nor those which may have been occasioned by his default, negligence, or mistake.

Where a principle as to the taxation of costs is involved, the Court will always entertain the question, and, if necessary, give directions to the master; but where it is a question whether the master has exercised his discretion properly, or it is only a question as to amount, the Court is unwilling to interfere unless there are very strong grounds to shew that the master is wrong in the judgment he has formed.

On the taxation of the costs of a petition, the master limited the fees of the leading counsel to 100 guineas with his brief and 25 guineas each day for a refresher, and those of the junior to 75 guineas with his brief and 15 guineas each day, in a case of an ordinary character, though the sums actually paid were larger. The Court refused to interfere, but intimated that, where, from its peculiar circumstances, a case was shewn to be of more than ordinary difficulty, the allowance was not necessarily to be so restricted.

The master disallowed all the fees for consultations during the trial, holding that they were covered by the allowance for refreshers. The Court directed him to review his taxation in this respect, and to allow such consultations as he might judge to have been reasonable in the progress of the trial.

The master disallowed all the costs incurred after the presentation of the petition and before the hearing, allowing instead a gross sum as "Instructions for brief," and there being no sufficient grounds shewn to induce the Court to doubt

that he had exercised a right judgment in the matter, they declined to order a review. But, in one case, where it was shewn that there were special circumstances which the master did not appear to have taken into consideration, the Court (Willes, J., dissenting) ordered a review in that respect.

The parties are entitled to have the judgment of the master upon the particular items in the preliminary expenses, if they think fit, instead of their being included in the allowance of one sum in gross to cover the whole of what he may think ought to be allowed.

The master disallowed the costs of an unsuccessful application at chambers, and to the Court by way of appeal, to increase the amount of the recognizances under s. 6, sub-s. 5, of the Act:—

Held, that this was an entirely collateral matter, and that the costs were properly disallowed.

HILL *v.* PEEL (THE TAMWORTH CASE).

This case was tried before Willes, J., on the 15th of February, 1869, when it was decided, amongst other things, that the respondents were duly elected and returned for the borough of Tamworth; and it was ordered that "all the costs, charges, and expenses of the respondent Sir Robert Peel, of and incidental to the petition, be paid by the petitioners."

The respondent's bill of costs amounted to 1623*l.* 10*s.*, which on taxation was reduced to 972*l.* 18*s.* The master altogether disallowed the charges (amounting to 90*l.* 19*s.* 8*d.*) which had been paid to one Shaw, a solicitor at Tamworth, whose assistance was sworn to be essential to the conduct of the respondent's case, considering them to be included in the sum of 105*l.* allowed as "Instructions for brief." The leading counsel received with his brief 250 guineas, and 50 guineas for a refresher for each day the trial lasted, and the junior 100 guineas with his brief and 25 guineas each day for a refresher. The master allowed for the leader 100 guineas with his brief and 25 guineas per day, and to the junior with his brief 75 guineas and 15 guineas per day,—the refreshers to include all consultations except one: the charges for all the other consultations were disallowed. The expenses preliminary to the hearing of the petition were charged in one item "Instructions for brief." The master reduced this item to 100 guineas.

BROAD *v.* FOWLER (THE PENRYN CASE).

This case was tried before Willes, J., on the 26th of February, 1869, when it was decided, amongst other things, that the respond-

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ents were duly elected, and it was ordered that "all the costs, charges, and expenses of the respondents, of and incidental to the petition, be paid by the petitioners."

The respondents' bill of costs amounted to 1780*l.* 1*s.*, which was reduced on taxation to 855*l.* 16*s.* 100 guineas were charged as "Instructions for brief," and all the preliminary expenses in detail in addition. The master struck out the preliminary charges and increased the item of 100 guineas to 150 guineas. He adopted the same course in this as in the preceding case with respect to the counsel's fees, and consultations, save that in this case he allowed the counsel with their briefs an additional fee of 25 guineas, on account of the great distance from London. He also disallowed the costs of an unsuccessful application which the respondents made at Chambers, and afterwards to the Court in Hilary Term, 1869, for an increase in the amount of the recognizances entered into by the petitioners, the petition being against two members.

PEGLER *v.* GURNEY (THE SOUTHAMPTON CASE).

This case was tried before Willes, J., on the 23rd of April, 1869, when it was decided, amongst other things, that the respondents were duly elected and returned; and it was ordered that "all the costs, charges, and expenses of the respondents, respectively of and incidental to the petition, be paid by the petitioner."

The respondent Gurney's bill of costs amounted to 2334*l.* 4*s.* 6*d.*, which was reduced on taxation to 847*l.* 4*s.* 10*d.* The master disallowed all the expenses incurred preliminary to the hearing, amounting to about 1000*l.*, including the attendance at Southampton of three experienced clerks from the office of the respondent's agents, who were employed to obtain information with a view to enable the respondent to meet the charges of bribery, treating, and undue influence (of which upwards of one hundred and sixty cases were included in the particulars delivered by the petitioner, in respect of each of which it was necessary to be prepared with an answer; and in lieu of all these the master allowed as "Instructions for brief" 105*l.* The brief

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was very voluminous (326 sheets), and contained instructions for the examination of eighty-five witnesses on behalf of the respondent. The leading counsel received with his brief 200 guineas, and 50 guineas each day for refreshers, besides consultation fees; the master allowed only 100 guineas with the brief and 25 guineas each day for refreshers, to include consultation fees. The junior counsel received 150 guineas with his brief, and 30 guineas each day for refreshers, besides consultation fees; the master allowed only 75 guineas with the brief, and 15 guineas each day for refreshers, to include consultation fees.

H. Giffard, Q.C., in Michaelmas Term last, obtained a rule nisi in each case for a review of the taxation.

Jan. 18. *H. James, Q.C.*, shewed cause against the rule in the *Tamworth Case*. The allowance of costs is regulated by s. 41 of the Parliamentary Elections Act, 1868 (1), which enacts that costs in these cases are to be taxed on the same principles as costs between attorney and client in a Chancery suit. Costs between attorney and client do not mean any costs the attorney or his client may choose to incur, but all such costs as are usually and reasonably incurred. It is not because the services of a particular counsel can only be obtained for an extravagant fee, and the client in his anxiety to retain his

(1) S. 41 of 31 & 32 Vict. c. 125, enacts that "all costs, charges, and expenses of and incidental to the presentation of a petition under this Act, and to the proceedings consequent thereon, with the exception of such costs, charges, and expenses as are by this Act otherwise provided for, shall be defrayed by the parties to the petition in such manner and in such proportions as the Court or judge may determine, regard being had to the disallowance of any costs, charges, or expenses which may in the opinion of the Court or judge have been caused by vexatious conduct, unfounded allegations, or unfounded objections on the part either of the petitioner or the respondent, and regard being had to the discouragement of any needless expense by throwing the burden of defraying the same on the parties by whom it has been caused, whether such parties are or not on the whole successful. The costs may be taxed in the prescribed manner (2), but according to the same principles as costs between attorney and client are taxed in a suit in the high Court of Chancery, and such costs may be recovered in the same manner as the costs of an action at law, or in such other manner as may be prescribed."

(2) Reg. M. T. 1868, reg. 55.

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seat is willing to give it, that it is chargeable against his adversary. There is nothing to shew that this case was one of such difficulty as to justify a larger fee than the master has allowed here. At all events, he has exercised his discretion in the matter, and the Court will not interfere. Then, as to the consultations, these are amply allowed for in the 25 guineas and 15 guineas respectively allowed for refreshers.

The preliminary charges for preparing for the defence, and the payments made to the local attorney, were compensated for by the allowance of 105*l.* for "Instructions for brief." The Court has no means whereby to ascertain what was reasonably or necessarily done. It is a matter of discretion, which must be left to the master to determine in each case, not of principle. Seeing that no particulars are delivered in these cases until three days before the trial, the inquiries for which these charges were made were not confined to the witnesses intended to be called, but probably extended to general inquiries into the state of the constituency, and speculations as to what sort of case the petitioners were going to set up. No doubt, a reasonable scope should be allowed for general inquiry; but of that the master is the proper judge. As to Shaw's bill of 90*l.* 19*s.* 8*d.*, that in truth contained charges for what the London attorney's clerk did or should have done during his fourteen days' stay at Tamworth, for which the master has allowed 10*l.*

H. Giffard, Q.C., and *Ledgard*, in support of the rule. In order to defend himself against the attack of the petitioners, the respondent must necessarily enter into extensive inquiries; and to limit his preparations for defence to the time when the particulars are delivered would be unreasonable. The object of s. 41 was, that the successful party should have a complete indemnity for all expenses reasonably incurred by him. As to the counsel's fees, the question to be considered is whether it is not reasonable that the party should have the assistance of counsel in whom he has confidence, and pay them such fees as may induce them to undertake the case. There are many cases where fees as large or larger than those paid here have been allowed, both at common law and in chancery, as between party and party. Then, as to the consultations, it was reasonable in such a case as this that there should be consultations

from time to time as the trial proceeded. [He referred to Morgan and Davey on Costs, p. 1].

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Cur. adv. vult.

Jan. 18. *H. Lloyd, Q.C.*, shewed cause against the rule in the *Penryn Case*. The costs of the unsuccessful application by the respondent at chambers, and subsequently to the Court, as to the amount of security to be given by the petitioners, were properly disallowed; they related to an entirely collateral matter. As to the other matters, the master has exercised his discretion, and the Court will not interfere.

H. Giffard, Q.C., and *Sleigh, Serjt.*, in support of the rule.

Cur. adv. vult.

Jan. 18. *Mellish, Q.C.*, and *Horace Davey*, shewed cause in the *Southampton Case*. The bill upon the face of it discloses a reckless expenditure which could in no case be allowed. The master has exercised his discretion, and it is impossible to say that he has not exercised it properly. There must clearly be a different principle of taxation as between party and party under this Act, and a taxation as between an attorney and his own client. In the former case, the person chargeable is to pay all costs which are justly and reasonably incurred, not such as the attorney in his anxiety to ensure his client's success might be justified in incurring for him. All that the Act means is, that the taxation shall be on a more liberal scale than a taxation between party and party. If it had been intended to afford a complete indemnity, the legislature would have said so in terms. Counsel's fees, as a general rule, are left to the discretion of the master, as well in Chancery as at common law: *Attorney-General* v. *Lord Carrington* (1); *Rumsey* v. *Rumsey* (2); *Lockstone* v. *The London and Brighton Ry. Co.* (3)

H. Giffard, Q.C., and *Ledgard*, in support of the rule. The principle contended for by the respondent is very like that which this Court acted upon in *Doe* d. *Hyde* v. *The Mayor of Manchester* (4), under words of a statute (8 & 9 Vict. c. 18, s. 124) less large and comprehensive than those of the statute under considera-

(1) 6 Beav. 454.
(2) 21 Beav. 40.
(3) 12 C. B. (N. S.) 243.
(4) 12 C. B. 474.

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tion. The agent for the respondent would not have acted prudently if he had omitted to send down proper persons to prepare for his client's defence to the grave charges made against him, and it can hardly be said that the allowance for counsel's fees was sufficient.

Cur. adv. vult.

Jan. 31. BOVILL, C.J. The judgment I am about to read is that of my Brother Brett and myself. My Brother Willes does not entirely concur in it; and, being unable to attend to-day, his judgment will be delivered by my Brother Brett.

The principle upon which the costs on election petitions are to be taxed is settled by s. 41 of the Parliamentary Elections Act, 1868, which enacts that they are to be taxed "according to the same principles as costs between attorney and client are taxed in a suit in the High Court of Chancery."

When the costs in these cases were taxed, the master of this Court appointed to perform the duties required under the Act, obtained the assistance of one of the taxing masters of the Court of Chancery. We have in like manner availed ourselves of the assistance of the senior taxing master of that Court, who was kind enough to favour us with his attendance during the argument, and to give us such information as we required as to the practice of the Court of Chancery, and for which we are much indebted to him.

The peculiarity of the case arises from the costs being payable as between party and party, and having to be taxed as between attorney and client; and this not absolutely, but only as in a suit in Chancery. The mode of taxation in such a case is stated in Mr. Osborne Morgan and Mr. Davey's work upon Costs in Chancery, p. 1, as follows:—"Costs as between solicitor and client payable by one party to another will not include all costs to which the solicitor would be entitled as against his client. It is impossible to lay down with exactness any rule upon the subject, but generally it would seem that all such costs would be allowed as a solicitor would ordinarily incur in the conduct of his client's business, excluding those extraordinary costs which may have been occasioned either by the default of the client, as, by his incurring a contempt, or by his express instructions, as, to employ an unusual number of counsel."

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The rule in the Chancery General Orders as to the fees to be allowed to solicitors for instructions for different proceedings is to be found at p. 404 of Morgan and Davey's book, and is as follows: "As to bills and answers, examinations, affidavits, and petitions, when the larger scale is applicable, in lieu of the fixed fees for instructions for and for drawing, the taxing master is to be at liberty to take into his consideration the special circumstances of each case, and at his discretion to make such allowances for work, labour, and expenses properly performed and incurred in or about the preparation of the bill or answer, examination, affidavit, or petition, as shall appear to him to be just, having regard to the length of the document, the nature of the suit, the interests of the parties, and the fund or person from which or by whom the costs are to be paid."

The 40th order of the Chancery Consolidated Orders, rule 32, which is to be found at p. 350 of the same book, provides for the taxation between party and party of the costs, inter alia, of procuring evidence by deposition or affidavit, and the attendance of witnesses, and directs the allowance of all such just and reasonable expenses as appear to have been properly incurred, but directs that, in allowing such costs, the taxing master shall not allow to such party any costs which do not appear to have been necessary for the attainment of justice or for defending his rights, or which appear to have been incurred through over caution, or negligence, or mistake, or merely at the desire of the party.

It appears, therefore, that, even as between party and party, a liberal scale of costs is to be allowed on taxation; and, when the costs are to be taxed as between attorney and client, it would seem that there should be an extension of this allowance. Even this, however, must be subject to some limitation; and we think the allowance must be confined to such costs as, having regard to the rules and orders before enumerated, may be said to have been reasonably incurred.

In the case of *Doe* d. *Hyde* v. *The Mayor of Manchester* (1), where, under a local Act which gave "full costs and expenses," the master had allowed liberal costs as between party and party, and the Court construed the Act to mean that the costs were to be

(1) 12 C. B. 474.

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taxed as between attorney and client, the order to review the taxation was qualified by confining it to such costs as had been reasonably expended in the litigation.

It is true that s. 41 of the Parliamentary Elections Act, 1868, enacts that "all costs, charges, and expenses of and incidental to the presentation of a petition under that Act, and to the proceedings consequent thereon," shall be defrayed in such manner as the Court or judge may determine, regard being had to any vexatious conduct or unfounded allegations or objections on either side, or the causing of any needless expense by either party. That, however, seems to apply rather to the question what costs are to be allowed than to the mode of taxing them.

4 C P D 22

The order for costs in each of these cases was general and without qualification on either of the grounds mentioned in this section of the Act of Parliament; and it therefore appears to us that the parties entitled to their costs under the orders were entitled to an indemnity for all costs that were reasonably incurred by them in the ordinary course of matters of this nature, but not to any extraordinary or unusual expenses incurred in consequence of over caution or over anxiety as to any particular case, or from considerations of any special importance arising from the rank, position, wealth, or character of either of the parties, or any special desire on his part to insure success. We think also that such extraordinary costs as an attorney would not be justified in incurring without distinct and special instructions from his client ought not to be allowed; nor the costs of purely collateral proceedings upon which a party has failed; nor those which may have been occasioned by his default, negligence, or mistake.

A rule very much to this effect was, we believe, adopted by the Court of Session in Scotland in the Dumfriesshire Election Petition, and by the Court of Common Pleas in Ireland upon the Youghal and Belfast Petitions. We are also of opinion that, when the election judge or Court orders payment of the costs without qualification, it was the intention of the legislature that the taxation should be liberal in favour of the successful party, and that the master should tax the costs accordingly.

9 C B. 411

A very wide discretion must necessarily be left to the taxing officer, which must be exercised by him after a careful considera-

tion of the particular circumstances of each case; and where, after properly considering the matter, the master has arrived at a decision, it lies upon those who impeach his decision to satisfy the Court that he is wrong. Where a principle is involved, the Court will always entertain the question, and, if necessary, give directions to the master; but, where it is a question of whether the master has exercised his discretion properly, or it is only a question as to the amount to be allowed, the Court is generally unwilling to interfere with the judgment of its officer, whose peculiar province it is to investigate and to judge of such matters, unless there are very strong grounds to shew that the officer is wrong in the judgment which he has formed.

The first question that was argued in these cases was, as to the fees allowed to the leading and junior counsel; and in all the cases one uniform fee of 100 guineas was allowed upon the briefs to the leading counsel, and 75 guineas to the junior counsel, being much less in each case than the fees that were actually paid. If these fees were allowed as being an uniform standard of allowance, without reference to the particular case, we think this course would be wrong, and that the master ought to exercise his judgment and discretion in each case; but, at the same time, we see no objection to the master adopting such a scale as an average for ordinary cases; and, unless there be some special circumstances, we see no objection to these fees being treated by the master as the proper sums to be allowed.

The *Cases* of *Tamworth* and *Penryn* seem to us to have been only of the ordinary description. The master appears to have so treated them, with the exception of allowing an additional fee in the latter case, on account of the great distance from London; and we think there is no ground upon which we can properly interfere with or review his decision either in point of principle or as a matter of discretion or amount.

The *Southampton Case* appears to us to stand upon a somewhat different footing. The master seems to have allowed the fees in that case rather as in accordance with a general rule than upon a due consideration of the circumstances of the particular case: and, looking to the affidavits and voluminous briefs in that particular case, we think it will be more satisfactory that the case should be

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re-considered by him, and upon the principles which we have laid down.

With regard to the refreshers to the different counsel, we see no reason to doubt the propriety of the master's decision, or that he has not allowed a sufficient amount in all the cases: but, as to the consultations, we think that the master, in allowing only one consultation, has assimilated the practice and the allowance on taxation rather too closely to the practice in ordinary actions at law, in which only one consultation is usually allowed. From the nature of the proceedings on an election petition, and the mode in which they are conducted, we think it most reasonable and proper that consultations should be held from time to time when different points and phases of the case are developed, as they necessarily must be in the course of such inquiries: and we think that such consultations are not only reasonable, but would be really necessary, in most cases, in the proper conduct of the proceedings. We think also that the fees for these consultations should be allowed according to the usual mode of charge in ordinary suits, and in addition to the refreshers for each day's attendance upon the inquiry. In this respect, therefore, we think the master should review his taxation in each of the three cases, unless the parties are willing to agree upon the amount to be added to the master's allocatur on this head.

Another important question raised in each of the cases was, as to the costs incurred after the presentation of the petition and before the hearing; and, as to these, the master seems to have allowed a gross sum in each case under the head of "Instructions for brief."

In the *Tamworth Case*, there could be no objection to his adopting this course, because these preliminary expenses were all charged, in accordance with a practice which had been adopted, in one item, as "Instructions for brief," and in which the details involved in the general charge were stated. The master has exercised his judgment and discretion upon the item and the amount, and reduced it to 100 guineas; and, from the nature of the details of this item, and the services stated to have been performed, and from the affidavits, we see no reason to doubt that the master has exercised a right judgment upon it: and we think there are no sufficient grounds shewn to induce us to remit this matter to him for review. It is true that Mr. Shaw's charges are disallowed, as

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well as the charges for railway fares, carriage hire, &c. But Mr. Shaw's bill is not before us; and, from the report of my Brother Willes, who tried the case, we are not satisfied that his bill of costs was properly chargeable against the petitioner. The railway fares and carriage hire are mere matters of amount, with which we cannot interfere.

In the *Penryn Case*, the respondents' agent had charged not only 100 guineas as "Instructions for brief," but also all the preliminary expenses in detail in addition. The master has struck out the preliminary charges, and increased the amount charged as instructions for brief from 100 to 150 guineas, in order to cover in this amount the preliminary expenses which in his judgment ought to be allowed. The master in this matter has clearly exercised his judgment and discretion: and, upon looking at the bill of costs, and the amounts charged for preliminary expenses, and which would be properly chargeable for such preliminary expenses, we see no reason to doubt the propriety of the master's decision: and the rule will therefore be discharged in the *Penryn Case* also upon this point.

The *Southampton Case* seems to us to be somewhat different as to the preliminary expenses. The costs charged on account of them amounted to nearly 1000*l.*, and 105*l.* only has been allowed. The master has not a very distinct recollection as to the principle upon which he acted: and, looking to the affidavits, and the absence of any answer to them, to the particulars, and the number of the votes objected to, the length of the briefs allowed by the master, the number of witnesses, and the other circumstances of the case, we think the decision of the master should be re-considered by him. We think also that the parties are entitled to have his judgment upon the particular items in the preliminary expenses, if they think fit, instead of their being included in the allowance of one sum in gross to cover the whole of what the master may think ought to be allowed.

In the *Penryn Case* a further question arose, as to the costs of an unsuccessful appeal to this Court by the sitting member against the decision of Willes, J., at chambers: but that appears to us to have been an entirely collateral matter; and, the Court having disposed of the question of costs upon the motion which failed, we

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think the respondent cannot be entitled to them, and that the master was therefore right in disallowing them.

WILLES, J. I concur, as to the consultations.

I also agree that, as to the rest, the rules ought to be discharged in the *Tamworth* and *Penryn Cases.*

As to the *Southampton Case,* having tried that and also the other cases moved, I am unable to concur in the distinction drawn by the rest of the Court in favour of the respondent. I do not doubt that extraordinary pains were taken and expense incurred because of the high judicial rank and eminent position of Mr. Russell Gurney,—a course natural enough in his case, but which would have been highly unreasonable in the case of an ordinary respondent. I think it would be unjust to saddle such costs upon the petitioner: and I am satisfied that the master has in this case, as in those of Tamworth and Penryn, taken extraordinary pains to be right. Having read his written report of the principle of his decisions, viz. that of allowing in each case as "Instructions for brief," such preliminary expenses as he thought the petitioner was entitled to, I cannot concur in a rule that he shall do the same thing over again in the *Southampton Case.*

I see no ground for interfering with the master's decision, except as to the consultations.

BOVILL, C.J. The result will be that the rules will be absolute in all the cases to review the taxation as to the consultations; and the rule will also be absolute in the *Southampton Case* as to the counsel's fees and the costs preliminary to the hearing of the petition: and, as these rules are part of the proceedings consequent upon the petitions and incidental thereto, we think the costs of them must also be allowed.

Rules absolute.

Tamworth case.—Agents for petitioners: *Maples, Teasdale, & Co.*
Agents for respondents: *Freshfields.*

Penryn case.—Agents for petitioners: *Wyatt & Hoskins.*
Agents for respondents: *Baxter, Rose, Norton, & Co.*

Southampton case.—Agents for petitioner: *Willoughby & Cox.*
Agent for respondent: *R. Wilson.*

JACOB HENRY TILLETT, PETITIONER; SIR HENRY JOSIAS STRACEY, BART., RESPONDENT.

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Taxation of Costs—Petition under Parliamentary Elections Act, 1868 (31 & 32 *Vict. c.* 125)—*Number of Counsel and their Fees—Consultations—Preliminary Expenses—Instructions for Brief—Number of Witnesses—Length of Brief.*

On the taxation of the costs of a petition under the Parliamentary Elections Act, 1868, the number of witnesses to be allowed, the length of the briefs and proofs, the number of counsel, and the amount of their fees, and the incidental expenses of the trial, are matters for the master's discretion, subject to the control, of the Court where a proper case is shewn for its interference.

The master, on taxation of the petitioner's costs, disallowed fees for consultations during the trial, the Court, in accordance with the *Tamworth Case* (ante, p. 173), directed him to review his taxation in that respect.

The master disallowed a moiety of the charges paid to the undersheriff on the trial: the Court declined to interfere.

PETITION under the Parliamentary Elections Act, 1868 (31 & 32 Vict. c. 125), against the respondent, who had been elected as member of parliament for the city of Norwich. The petition charged bribery, treating, and undue influence, and claimed the seat for the petitioner. The petition was tried before Martin, B., on the 14th of January, 1869, when that part which related to the claim of the seat was abandoned, and it was decided, amongst other things, that the election of the respondent as member for the city of Norwich was void for bribery; and it was ordered "that the costs, charges, and expenses of and incidental to the petition and the proceedings consequent thereon, so far as related to the determination that the respondent was not duly elected, and so far as related to the recrimination against the petitioner, be paid to the petitioner by the respondent; and that the costs, charges, and expenses of the respondent in regard to the claim that the petitioner was duly elected and ought to have been returned, be paid to the respondent by the petitioner."

The petitioner's bill of costs amounted to 3015*l.* 7*s.* 8*d.*, which on taxation was reduced to 703*l.* 3*s.* The petitioner had subpœnaed 400 witnesses, most of whom it became unnecessary to call, in consequence of the judge having on the third day of the trial decided that the petitioner had sufficiently established

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bribery by the respondent's agents. Of these 400 witnesses the master allowed only seventy-two, reducing the sum paid to the witnesses from 377*l.* 0*s.* 6*d.* to 76*l.* 18*s.* 6*d.* The principle upon which the master proceeded was, not to allow a witness who was not examined, unless the proofs shewed that he had bribed or been bribed, or had given information upon which it was proposed to cross-examine a hostile witness. Of the witnesses so subpœnaed but not allowed, fifty had since the taxation admitted before the Royal Commission appointed to inquire and report to the House, that they had been bribed by the respondent. The master also disallowed all the attendances and charges for getting up the evidence, prior to the preparation of the brief, amounting to upwards of 700*l.*, and in lieu thereof allowed 120 guineas as "Instructions for brief." He also materially reduced the charge for "drawing brief," by allowing only at the rate of a folio and a half for the "proof" of each witness, without regard to the actual length. The fees paid to counsel were, 200 guineas and 100 guineas respectively to the leader and the second counsel with their briefs, and 50 guineas and 25 guineas per day for refreshers; those allowed were, 100 guineas and 25 guineas per day to the leader, and 75 guineas and 15 guineas per day to the second counsel,—the third counsel being altogether disallowed. All the consultation fees except one to the leader and second counsel were also disallowed. Mr. Abel Tillett was employed by Messrs. Ashurst & Co., the agents of the petitioner in London, as the local solicitor at Norwich. The master, as was alleged, considering Mr. Abel Tillett as the attorney to the petition, instead of Ashurst & Co., disallowed payments made by the latter for the expenses of clerks sent down to Norwich by them to get up evidence to support the petition, amounting to 233*l.* He also disallowed 20*l.* of the charge of 42*l.* made by the undersheriff for his services.

Keane, Q.C., in Michaelmas Term last, obtained a rule on behalf of the petitioner to review the taxation, upon the following grounds: 1. The disallowance of the expenses of and the costs as to fifty witnesses who subsequently to the taxation admitted bribery before the Royal Commission. 2. The disallowance of the charges for getting up the evidence prior to the preparation of the brief, and

the allowance of 126*l.* as "Instructions for brief" instead thereof, the only basis on which the last-mentioned amount was ascertained being the number of witnesses allowed. 3. The allowance for drawing and copies of the brief of a folio and a half for each witness, without regard to the actual length. 4. The disallowance of part of the fees paid to two counsel, and of all the fees paid to one counsel, and the disallowance and reduction of the attorney's charges consequent thereon, and also the fees for consultations. 5. The treating Mr. Abel Tillett as the attorney to the petition instead of Messrs. Ashurst & Co., and the disallowance in consequence thereof of payments made by the latter.

But the Court refused to grant a rule as to the reduction of the undersheriff's charge, and also as to the disallowance of the witnesses who had been subpœnaed but were not called at the trial; holding these to be matters in the discretion of the master, and that there was nothing brought before them to shew that his discretion had not been properly exercised.

Mellish, Q.C., and *F. M. White*, shewed cause. They submitted that the case as to the counsel's fees (except as to the consultations, in respect of which it was conceded the rule must be made absolute), and as to the preliminary expenses, was governed by the *Tamworth* and *Penryn Cases* (1); and, as to all the rest, that they were matters for the master's discretion, and there was nothing to shew that he had failed in the proper exercise of it.

Keane, Q.C., in support of the rule.

BOVILL, C.J. The rule was granted in this, as in the other cases (2), for the purpose of having the matter fully discussed. In two of those cases, viz. *Peel* v. *Hill* (3) and *Broad* v. *Fowler* (4), the rules were discharged as to all the points except as to the consultation fees. In the other, viz. *Pegler* v. *Gurney* (5), the Court directed the master to review his taxation, not only as to the consultation fees, but also with respect to the preliminary expenses and the counsel's fees, being satisfied, from the uncontradicted statements in the affidavits, and from an inspection of the briefs,

(1) Ante, pp. 173, 174.
(2) Ante, p. 172.
(3) Ante, p. 173.
(4) Ante, p. 174.
(5) Ante, p. 174.

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that there might be ground for considering the case one of more than ordinary difficulty. In the present case the brief is not produced, and there is nothing on the face of the affidavits to enable us to say that the master has not exercised a proper discretion as to the several matters brought before him, except as to the consultation fees. One main difficulty in this case arose from there being cross-cases all mixed up in one brief; in consequence of which, the master had to discriminate between the costs applicable to that part upon which the petitioner succeeded and that upon which he failed. Without going into the matter in detail, which, in the absence of the briefs, we cannot do, it is impossible for us to say that the master has done wrong. Now, the first ground of complaint was that the master disallowed fifty witnesses who subsequently admitted bribery when examined before the Royal Commission. It may very well be that these witnesses would admit before the commissioners (who had power to give them a certificate which would protect them against the consequences) that which they would not have admitted when called upon to appear as witnesses on the trial of the petition. The master could only look at the state of things which existed at the time the witnesses were subpœnaed. He seems to have come to the conclusion that the manner in which the witnesses had been subpœnaed was reckless and unreasonable; and it is difficult for us to say that he could have exercised his discretion in any other way than he has done. Out of the 400 witnesses subpœnaed, he has allowed seventy-two. Surely that would be a sufficient number to prove bribery. Then, as to the preliminary expenses, the complaint is that the master has disallowed items of charge for getting up the case amounting to over 700*l.*, and has only allowed in lieu of them 120 guineas as "Instructions for brief." It was suggested that that sum of 120 guineas was calculated on the basis of the number of witnesses who were allowed. The master, however, reports otherwise to us. It lies on the party who impeaches what the master has done, to shew that he has done wrong; and in this, I think, the petitioner has failed. The third head of complaint, viz. the allowance in the brief of a folio and a half for the proofs of each witness, must of course depend on the nature of the proofs. The master would not allow for drawing the brief a repetition of

long evidence as to each separate witness: and, without seeing the brief, which is not produced, it is impossible for us to say that the proper allowance has not been made. As to the number of counsel, that, as I understand the rule, has always been left to the master's discretion. The ordinary number of counsel is two only; and it lies on the party who seeks for the allowance of a greater number, to shew clearly that the case is of a nature to require more than two. No necessity for more than two counsel has been shewn here. As to the fees paid to the two counsel (apart from the question of consultation fees), looking at the length of the brief, as shewn by the charge allowed for drawing, viz. 350 folios only, I certainly think that, regard being had to the rule laid down in the *Tamworth* and *Penryn Cases* (1), enough has been allowed. Then it was said that Mr. Abel Tillett was erroneously treated as the attorney to the petition, instead of Messrs. Ashurst & Co. The master, however, reports to us that he allowed the costs of both, as he conceived the charges to be applicable to that part of the case upon which the petitioner was entitled to costs. The rule will, therefore, be absolute as to the consultation fees only, the costs of the rule to be paid by the respondent.

MONTAGUE SMITH, J., concurred.

BRETT, J. I have only doubted as to the preliminary expenses. The master has struck off all the specific items of charge under that head, and has allowed 120 guineas as "Instructions for brief." If I were satisfied that the master did this without going into the several items, I should have thought it right to send the matter back to him. But he has reported to us that he did go into all the items, and came to the conclusion that 120 guineas was enough to cover them. Upon the whole, I cannot see that the master has done wrong, save as to the consultation fees.

Rule absolute accordingly.

Agents for petitioner: *Ashurst, Morris, & Co.*
Agents for respondent: *Holmes & Co.*

(1) Ante, pp. 173, 174.

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LIDGETT and Another *v.* SECRETAN.

Marine Insurance—Construction of Policy—"Thirty Days after Arrival"—Mooring at Anchor in "good Safety"—Termination of Risk.

By a Lloyds' policy on ship, the risk was described in writing to be "at and from London to Calcutta, and for thirty days after arrival," and then followed the usual printed words, "upon the said ship, &c., until she hath moored at anchor twenty-four hours in good safety."

After having sustained damage at sea to such an extent as to require constant pumping to keep her afloat, the vessel arrived at Calcutta, and was safely moored there on the 28th of October, 1866. Her cargo was unloaded in safety by the 8th of November. It was necessary to continue the pumping during the discharge of the cargo until she was much lightened. On the 12th she was taken from her moorings to a dry-dock for survey and repair, and was there destroyed by an accidental fire on the 5th of December:—

Held, that, as the vessel remained at her moorings more than twenty-four hours as a ship, though damaged, and not as a mere wreck, she had been moored "twenty-four hours in good safety," and as her destruction did not take place until after thirty days from that time, that the risk had terminated at the time of the loss.

Whether the thirty days were to be reckoned from the arrival at Calcutta or from the expiration of the twenty-four hours after she had been moored in good safety, *quære?*

Action upon two policies of insurance upon the iron sailing ship *Charlemagne*. Pleas: Never indebted to the money counts; and to the counts upon the policies, payment into court of 110*l.*; to which the plaintiffs replied that the sum so paid in was not sufficient to satisfy their claims.

The cause was tried before Bovill, C.J., at the sittings in London after Michaelmas Term, 1868, when a verdict was taken for the plaintiffs, subject to a special case. The material facts in the special case were as follows:—

In July, 1866, the plaintiffs were the owners of an iron sailing ship, the *Charlemagne*, of the burthen of 1125 tons.

The plaintiffs effected two policies of insurance in the ordinary printed form of Lloyds', the risk being expressed in writing to be "at and from London to Calcutta, and for thirty days after arrival," and was further expressed in printed words to be upon the said ship "until she had moored at anchor twenty-four hours in good safety." The defendant underwrote these policies.

The plaintiffs also effected another policy on the *Charlemagne*

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"at and from Calcutta to London," in the usual Lloyds' form, and the defendant underwrote this policy.

On the 22nd of July, 1866, the *Charlemagne* sailed from London on her voyage to Calcutta with cargo. She called at Plymouth, and there took on board about 400 troops. She proceeded on her voyage, and on the 24th of October she struck upon a reef or bank, and suffered considerable damage. She was ultimately got off the reef, but in a leaky state, and her after-compartment, which was separated from the rest of the vessel by a water-tight bulkhead, filled with water. Besides this leakage, the steering apparatus was much damaged, and would not work properly, which materially affected her steering. The vessel had to be constantly pumped night and day to keep her afloat until her arrival at Calcutta.

On the 28th of October the vessel came to anchor in the river opposite Calcutta, and was there perfectly and securely moored in the usual way, and in accordance with the regulations of the port.

The place where she was moored was within the harbour of Calcutta, and was a place where vessels commonly discharge their cargo. The master on the same day gave the pilot the usual certificate, in which he certified that the vessel had been properly moored in a clear berth, and that the pilot left her "in safety."

Sixteen lascars with a fire engine were employed to pump the vessel while the cargo was unloaded. The discharge of the cargo was proceeded with quickly, and was safely completed by the 8th of November. As the cargo was discharged and the vessel lightened, the leak became less, and the water was completely under command of the ship's pumps; and the lascars, who up to this time had been continuously employed, were discharged.

All vessels lying in the Hooghly are exposed to several sources of danger; for example, at the time of year in question, there are powerful currents in the Hooghly, running in opposite directions,—a superficial one of several feet in depth running downwards to the sea, and a deeper one running up the country. These currents are sometimes strong enough to tear a vessel from her moorings. Hence, all vessels so lying are in some peril; and a vessel whose steering apparatus is injured is in greater peril than one whose steering apparatus is in good order. The same effect is also liable to be

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produced by what is called the bore. This consists of a rapid and powerful influx of water from the sea, at a height of several feet above the river level.

The discharge of the vessel was completed, with the exception of 200 tons of iron which were left in for ballast, and she was ready to go into dock on the 8th of November; and there were docks able and ready to have taken her. On the 12th of November, the vessel was taken to a dry-dock for survey and repairs. It was then found that she was much strained, injured, and leaky, and that she required considerable repairs.

On the 5th of December she caught fire inside, and was totally destroyed. (1)

The question for the opinion of the Court was, whether the plaintiffs were entitled, under the above circumstances, to recover against the defendant for a total loss under the outward policies. If the Court should be of opinion that the plaintiffs were so entitled, it was to be left to an arbitrator to determine what sum the plaintiffs were entitled to recover, in addition to the sum paid into court. But, if the Court should be of a contrary opinion, the arbitrator was to determine whether the sum of 110*l.* was sufficient to satisfy the plaintiffs' claims for the partial loss under the outward policy and the total loss under the homeward policy; and, if not, to what further sum the plaintiffs were entitled, &c.

Jan. 24. *Sir G. Honyman, Q.C.* (*Watkin Williams* and *Cohen* with him), for the plaintiffs. According to the true construction of the policy, the ship was covered until she had been at Calcutta for thirty days after she had arrived and moored at anchor in good safety there for twenty-four hours. The thirty days are to be reckoned from the expiration of twenty-four hours after the vessel has been moored at anchor in good safety: *Mercantile Marine Insurance Company* v. *Titherington*. (2) The question then is what is the meaning of "moored in good safety."

[BRETT, J., referred to 1 Arnould on Insurance, 2nd ed. 395.]

The authorities there cited do not bear out the text. They are

(1) In addition to the above facts, the special case stated a mass of evidence concerning the precise nature of the damage suffered by the vessel, and other matters. The facts set out in the text are those upon which judgment was given.

(2) 5 B. & S. 765; 34 L. J. (Q.B.) 11.

Shawe v. *Felton* (1), *Minett* v. *Anderson* (2), and *Horneyer* v. *Lushington.* (3) The last two cases involved political safety; in the first, Lord Kenyon says, (4) "the vessel came there a perfect wreck, having received her death's wound at sea, and was with the utmost difficulty kept afloat till all the people on board were landed." In *Waples* v. *Eames* (5), the captain had not complied with the regulations of the port, and therefore was not in a condition to discharge the cargo. "Moored in good safety" must mean something more than simply being moored: 1 Phillips on Insurance, 4th ed. §§ 968, 9, citing *Angerstein* v. *Bell* (6), *Samuel* v. *Royal Exchange Assurance Co.* (7), and *Bill* v. *Mason.* (8) Where a ship has sustained such damage that she can only be kept afloat by extraordinary exertions, she cannot be said to be "moored in good safety." There is a good definition given in 2 Parsons on Marine Insurance (ed. 1868), p. 59:—"By safety is meant not security from the hazard of every loss insured against,—for, some of them, as fire, lightning, &c., remain always,—but the being moored in fact during twenty-four hours safe, in the sense of uninjured. But, if the vessel arrives a mere wreck, she cannot be said to have been in safety a moment. Nor, if an embargo had been laid on all vessels previous to the arrival of the one insured, although she should not be arrested till the next day." For these positions English and American authorities are cited. To satisfy the policy, the vessel must have been moored in safety and at the usual place of mooring. It clearly would not be enough if she arrives there a mere wreck, and merely afloat. Perhaps the best test is whether the homeward policy would attach. Would this vessel be protected after the twenty-four hours by her homeward policy? In *Parmeter* v. *Cousins* (9), the policy was "at and from the island of St. Michael's." The ship arrived there in a very disabled state; and, after lying at anchor above twenty-four hours in great danger from a storm, was blown out to sea and wrecked: and it was held that the policy on the homeward voyage never attached. It may be asked here, as was asked in argument there, "If, in this case,

(1) 2 East, 109.
(2) Peake, 211 (3rd ed. 277).
(3) 15 East, 46.
(4) 2 East, at p. 114.
(5) 2 Stra. 1243.
(6) 1 Park Ins. 8th ed. 54.
(7) 8 B. & C. 119.
(8) 6 Mass. R. 313.
(9) 2 Camp. 235.

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the policy on the outward voyage had expired, and the policy on the homeward voyage had not attached, how was the ship-owner to secure himself an indemnity during the whole course of the adventure?" The statements in the case shew that the vessel was in a condition which was inconsistent with safety. The averment that she "came to anchor in the river opposite Calcutta, and was there perfectly and securely moored, in the usual way," means only that she was securely moored quâ the mooring, not that she was moored in "good safety." The certificate given by the captain to the pilot was no more than the usual discharge, intimating that his duty was performed.

J. C. Mathew (*Mellish, Q.C.*, with him), for the defendant. The vessel was protected until she should have arrived at the place of discharge, and further from any peril occurring to her within twenty-four hours after her arrival there. The words "in good safety" have reference to intervening perils between the arrival and the expiration of the twenty-four hours. In a policy on goods, the words "until the same be there discharged and safely landed" are satisfied if the goods arrive at the port of destination and are landed though in a damaged state. There is no authority for saying that the ship must at her arrival be in a condition of absolute safety, and that, if she be not, the underwriters are liable for any loss subsequently occurring,—which is the length to which the argument for the plaintiffs must go. In *Shawe* v. *Felton* (1), the ship at the time she arrived at Demerara was a constructive total loss. The case, therefore, falls within the class to which *Knight* v. *Faith* (2) belongs. In *Lockyer* v. *Offley* (3), the underwriters were held not to be liable for a loss by seizure after the vessel had been twenty-four hours in port, though such seizure was in consequence of an act of smuggling committed by the master during the voyage. In *Bill* v. *Mason* (4), a ship arrived at her port of destination in a gale of wind, and came to anchor; the gale increased during the twenty-four hours, and after the expiration of that period she lost her anchors and was driven on shore; and the underwriters were held to be discharged. Parsons, C.J., there says: (5) "The effect of

(1) 2 East, 109.
(2) 15 Q. B. 649; 19 L. J. (Q.B.) 509.
(3) 1 T. R. 252.
(4) 6 Mass. R. 313.
(5) 6 Mass. R. at p. 314.

this clause in policies assuring a vessel after she shall have arrived at her port of destination and been moored at anchor twenty-four hours in safety, is in fact a prolonging of the time for which the assurers have engaged to be liable, without varying the nature of the perils insured against. If without this clause the vessel be insured to her port of destination, the voyage is determined on her arrival and being moored on the usual anchorage-ground; but with this clause the policy is further extended twenty-four hours. If, therefore, no loss for which the underwriters are answerable shall happen during the voyage, or during twenty-four hours after, they are discharged." In *Angerstein* v. *Bell* (1), the ship arrived at the wharf where she intended to unload, and was moored on the outside of a tier, there being no room for her within, and after the twenty-four hours she was driven out to sea and lost; and the insurers were held not liable.

[BRETT, J. Suppose a vessel arrives at her destined port so damaged as to be a mere ruin, utterly incapable of being repaired, and is burnt after the expiration of the extended period, would the underwriters be liable?]

If the ship on her arrival is not in such a state as to amount to a constructive total loss, the policy is determined when she has been moored at anchor twenty-four hours at the usual place of mooring: *Whitwell* v. *Harrison*. (2) In *Waples* v. *Eames* (3), *Horneyer* v. *Lushington* (4), and *Samuel* v. *Royal Exchange Assurance Co.* (5), the vessels were lost by a peril insured against within the time assigned by the respective policies for the termination of the risk; they had reached their destined ports, but had not been moored twenty-four hours in good safety. In *Roche* v. *Thompson* (6), the only report of which is to be found in Weskett on Insurance, p. 196, a ship was insured from Limerick to Havre. She arrived there after having suffered damage during the voyage, and whilst being repaired some weeks after her arrival she was seized in the port of Havre, an embargo having been laid there on British ships, and hostilities commenced between France and England.

(1) 1 Park Ins. 8th ed. 54.
(2) 2 Exch. 127.
(3) 2 Str. 1243.
(4) 15 East, 46.
(5) 8 B. & C. 119.
(6) Guildhall, sitting after Trin. T. 1779.

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The owner brought actions against the insurers, and claimed for a partial loss for the damage, and for a total loss in consequence of the seizure. The defendants paid about 10 per cent. into Court as the amount of the repairs for the damages accrued during the voyage, which, according to the policy, ended "twenty-four hours after the ship arrived and was safely moored" at Havre; and the defendants obtained a verdict. That case is referred to in 2 Parsons on Marine Insurance (ed. 1868), p. 67, as an instance of a loss happening after the termination of the risk. The liability of the underwriters on such a policy as this determines when the vessel has arrived at her port of destination, and is moored in the usual place of discharge, and there remains in safety for twenty-four hours, however damaged, unless she is in such a state as to amount to a constructive total loss. The vessel had sustained no such injury as to justify a claim on the underwriters for a total loss, until after the expiration of the thirty days,—which period might, if necessary, be contended to be a substitution for the printed words in the policy, "until she hath moored at anchor twenty-four hours in good safety." *The Mercantile Marine Insurance Co.* v. *Tetherington* (1) has no application: the language of the policy was different from that in this case; and all it decides is that effect must be given to all the words of a policy, provided it creates no inconsistency.

Sir G. Honyman, Q.C., in reply. The twenty-four hours form part of the duration of the voyage. In *Bill* v. *Mason* (2), the ship had arrived at her destined port wholly undamaged: the only question was whether she had reached her place of discharge when the loss occurred. Suppose this vessel had arrived in the Hooghly on fire, though still in a condition to be kept afloat, and after the twenty-four hours a cyclone had sent her to the bottom,—could it have been said that she had moored twenty-four hours in good safety? The argument on the other side gives no effect whatever to the words "in good safety."

[BRETT, J., referred to *Ionides* v. *Universal Marine Insurance Association.* (3)]

Cur. adv. vult.

(1) 5 B. & S. 765; 34 L. J. (Q.B.) 11.
(2) 6 Mass. R. 313.
(3) 14 C. B. (N.S.) 259; 32 L. J. (C.P.) 170.

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Feb. 7. The judgment of the Court (Bovill, C.J., Willes, J., and Brett, J.) was delivered by

BOVILL, C.J. The policy in this case, which was upon the ordinary printed form of a Lloyds' policy, was effected by the plaintiffs on their iron sailing ship *Charlemagne*. The risk was described in writing to be " at and from London to Calcutta, and for thirty days after arrival ;" and by the other terms of the policy was to continue until the said ship, &c., should be moored at Calcutta. Then followed the usual printed words, " upon the said ship, &c., until she hath moored at anchor twenty-four hours in good safety."

The ship left London for Calcutta, and, after sustaining damage at sea, arrived in the river Hooghly in the month of October, 1866. She was then taken in tow by a steam-tug, and brought to moorings at an usual place of discharge within the harbour of Calcutta, where she came to anchor and was moored on the 28th of October. The captain gave the pilot the usual certificate that she was then properly moored and left in safety.

She had brought troops from England, who then disembarked, and her cargo was unloaded and completely and safely discharged by the 8th of November, with the exception of 200 tons of iron, which were left in her for ballast.

On the 12th of November, she was taken from her moorings to a dry-dock for survey and repairs ; and, in the course of her repairs in the dock, the vessel accidentally caught fire and was wholly destroyed on the 5th of December.

It was found in the case that the vessel had sustained considerable damage from striking on a reef or bank before she reached Calcutta, whereby she became much strained and injured and leaky. Considerable repairs were necessary; and she required extraordinary pumping, which was done at first by the troops on board, and afterwards by an engine and lascars from the shore, to get her clear of the water which was in one of her compartments. She was also injured in her rudder or steering apparatus, so as materially to affect her steering ; and she was in danger of breaking from her moorings, from the currents and bore of the river Hooghly : and, if she had broken away, the defect in her steering apparatus would have further endangered her. But, notwithstanding these matters, she remained at her moorings for more than twenty-four

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hours as a ship, though damaged, and safely discharged her cargo.

Under these circumstances, it was contended on behalf of the plaintiffs that they were entitled to recover as for a total loss by fire; and on behalf of the defendant that the plaintiffs were only entitled to claim in respect of the partial loss by sea-damage before the arrival of the ship at her moorings, and that they were not entitled to claim anything in respect of the loss by fire, because such fire occurred after the termination of the risk under the policy.

If the thirty days covered by the policy are to be reckoned from the time of the ship's arrival at Calcutta, either in the sense of arrival in the port, or arrival at and being finally moored at an ordinary place of mooring and discharge within the port, then, as the fire and loss of the vessel did not occur until the thirty-eighth day after she was so moored at Calcutta, viz. the 5th of December, the loss would not come within this policy: but, if the risk was extended, and continued beyond such thirty days, by reason of the printed words "until she hath moored at anchor in good safety," and of the vessel having been moored in a damaged state as described, then the ship was covered by this policy at the time of the fire on the 5th of December, and the defendant would be liable for the total loss by fire.

Whether the thirty days were in this case to be reckoned from the arrival only of the vessel at Calcutta, or from her having been moored at anchor twenty-four hours in good safety, it is not necessary to determine, because we are all of opinion that, even in the latter view, the defendants are entitled to judgment.

Assuming, then, that the thirty days are to be reckoned from the time of the ship being moored for twenty-four hours in good safety, the question arises, what is the meaning of those words in such a policy.

We are of opinion that the meaning is not, as has been contended, that the moorings are safe, but that the words refer to the ship being in safety. The words cannot mean that the vessel is to arrive without any damage or injury whatever from the effects of the voyage; otherwise, the loss of a mast, or even a spar, a sail, or a rope, though the vessel was perfectly fit to keep not only the

river but the sea, would, contrary to all the ordinary meaning of language, prevent her from being considered as in safety. So, on the other hand, the words would not in our opinion be satisfied by the vessel arriving and being moored in a sinking state or as a mere wreck, or by a mere temporary mooring.

We think also that the mere liability to damage, whether partial or total, during the twenty-four hours, by the occurrence of some or all of the perils insured against, cannot prevent the running of the twenty-four hours, because the extension of the period of risk for twenty-four hours after having moored in good safety clearly implies that, notwithstanding the safety intended, the ship is liable to partial or total loss by the occurrence of a peril insured against.

The American decision upon that point, of *Bill* v. *Mason* (1), proceeded on the ground that, although the ship was, during twenty-four hours after being moored, liable to damage or total loss, she was not in fact either lost or in that case even damaged. Where, on the other hand, a ship arrived in port in a sinking state, and, on being moored, was obliged to be lashed to a hulk in order to keep her afloat until the people on board were landed, and where she sunk on being moved towards the shore, it was held that she was not moored in safety, because the Court considered that she in fact arrived as a wreck, and not as a ship: *Shawe* v. *Felton.* (2) So, where a vessel arriving in a hostile port with simulated papers had her papers immediately taken and her hatches sealed down by the officers of government, although she was not formally condemned until afterwards, it was held that she had not been moored in safety for twenty-four hours, because she was in effect within the twenty-four hours taken from her owners by the foreign government: *Horneyer* v. *Lushington.* (3) Nor was a vessel which had been for a short period moored to a wharf, but within twenty-four hours was ordered into quarantine, and whilst there, but more than twenty-four hours after the original temporary mooring, was lost by a peril insured against, considered to have moored in good safety, because, as it would seem, she had not, before the loss in respect of which the claim was made been

(1) 6 Mass. R. 313. (2) 2 East, 109.
(3) 15 East, 46.

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finally moored at the ordinary place of mooring: *Waples* v. *Eames*. (1)

Where a vessel, after being moored, remained in actual safety as a ship for twenty-four hours, and so that during those twenty-four hours her owners had complete and undisturbed possession of her, but afterwards she was seized in consequence of the master having smuggled before her arrival, it was held that the terms of the policy were satisfied, and that the loss by the seizure was a loss after the termination of the risk: *Lockyer* v. *Offley*. (2) In that case, Willes, J., in delivering the judgment of the Court, said (3): "There must be some certain and reasonable limitation in point of time laid down by the Court when the insurer shall be released from his engagement. If he be liable for a month, he may be for a year, and so on. And we all think that the law on insurances would be left unsettled and in much confusion if any other time were suggested than that prescribed by the policy, viz. the continuance of the voyage and the ship's being moored twenty-four hours in safety."

In the present case, the vessel, though considerably damaged and leaky, and with one compartment full of water, existed as a ship at the time of her arrival, and she was able to keep afloat and did keep afloat as a ship for more than twenty-four hours after being moored, by exerting the means within the power of the captain. She arrived and moored at the ordinary place for unloading, and was so moored as a ship in the possession or control of her owners for more than twenty-four hours; and she remained as a ship and in possession of her owners for more than thirty days after the lapse of the twenty-four hours before described, and until the time of the fire by which she was totally lost.

If the underwriters are liable beyond thirty days from her being so moored for twenty-four hours, it is difficult under such circumstances to see when the liability is to end. We think the only safe rule in this case is, to hold that, after the expiration of thirty days from the arrival and mooring of the vessel, and her having remained as a vessel, and in the possession or control of her owners, though not sound, for twenty-four hours, the underwriters were

(1) 2 Str. 1243. (2) 1 T. R. 252.
(3) 1 T. R. at p. 261.

not responsible. We are, therefore, of opinion that there was not a total loss within the period of risk covered by this policy, and that our judgment should be for the defendant.

Judgment for the defendant.

Attorneys for plaintiffs: *Thomas & Hollams.*
Attorneys for defendant: *Waltons, Bubb, & Walton.*

THE GUARDIANS OF THE MALLING UNION *v.* GRAHAM. *Jan.* 21.

Principal and Surety—Acceptance by Principal of a new Office—Assistant-Overseer—Collector of Rates—Resignation under 59 *Geo.* 3, *c.* 12, *s.* 7—*Appointment under* 7 *&* 8 *Vict. c.* 101, *s.* 62.

By 59 Geo. 3, c. 12, s. 7, the vestry of a parish are empowered to elect assistant-overseers, and two justices may by warrant appoint the persons so elected to be assistant-overseers for the purposes and with the salary fixed by the vestry; and every person so appointed shall continue to be assistant-overseer until he shall resign, or his appointment be revoked by the vestry.

By 7 & 8 Vict. c. 101, s. 62, on application by the board of guardians of any parish or union, the Poor Law Commissioners may direct the guardians to appoint a paid collector of poor-rates for such parish or union, and all powers of the vestry, or of justices, or of any persons other than the board of guardians to appoint a collector, and all appointments under such powers, shall cease.

In April, 1865, A. was, under 59 Geo. 3, c. 12, s. 7, elected by the vestry of the parish of West Malling, and duly appointed by two justices, assistant-overseer of the parish, at a salary of 20*l.* a year. The warrant of appointment defined his duties, amongst which were the collection of poor-rates and the keeping of accounts.

In June, 1865, the defendant became surety for A. in a bond to the guardians of the union which comprised West Malling, the condition of which bond was that A. should faithfully perform all the duties of his office, and in all matters relating thereto obey the overseers, subject to the orders of the poor-law board, and keep books, and pay over moneys to such persons as the overseers should direct.

In April, 1866, the board of guardians of the Malling Union, on the recommendation of the vestry of West Malling, appointed A. collector of the poor-rates for West Malling at a poundage of 6*d.* The poor-law board duly approved the appointment, and made an order fixing the remuneration of the collector at 6*d.* in the pound, as proposed. The duties under the two appointments were substantially the same. After the last appointment A. continued to perform the same duties as he had before performed, and the appointment of April, 1865, was not otherwise resigned or revoked.

A. having made default, after the last appointment, in keeping books and in paying over money, the defendant was sued on the bond:—

Held, that the two appointments were inconsistent and incompatible; that the

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appointment of April, 1865, ceased, by virtue of 7 & 8 Vict. c. 101, s. 62, on A.'s acceptance of the appointment by the guardians in 1866; and consequently that the liability of the defendant as surety on the bond was at an end.

Semble, that there was, under the circumstances, both a revocation of the first appointment by the vestry, and a resignation by A.

SPECIAL case stated pursuant to an order of nisi prius.

1. Declaration upon a bond by which the defendant became bound to the plaintiffs in 300*l.*, conditioned for the due performance by one Assiter of the duties of the office of assistant-overseer of the parish of West Malling, which is comprised within the Malling Union. First breach, that Assiter, after his appointment, and while such assistant-overseer, did not from and after the 28th of September, 1867, duly keep a certain book of account called the collecting and deposit book. Second breach that, after the appointment of Assiter, 231*l.* 2*s.* 5*d.* was a balance due from him as such assistant-overseer, and he was required to pay it over to the overseers of the parish of West Malling, but he neglected and refused so to do.

Pleas: 1. That the defendant did not make the bond. 2. To the first breach, that, during all the time Assiter continued assistant-overseer, he did duly keep all books of account of the parish; and that, before the 28th of September, 1867, Assiter was duly appointed collector of the poor-rates of West Malling, and that all omissions to make entries in the books of account of the parish occurred after Assiter had been appointed such collector of poor-rates, and the moneys received by him were received as collector of poor-rates, and not as assistant-overseer. 3. To the second breach, that the 231*l.* 2*s.* 5*d.* was not a balance due from Assiter as assistant-overseer, but that Assiter had ceased to be such assistant-overseer before that sum was received, and that the sum was received by Assiter as collector of poor-rates under an appointment made, as in the second plea mentioned, and that Assiter accounted for and paid over all moneys received by him as assistant-overseer. Issues thereon.

2. At a vestry meeting of the parish of West Malling on the 25th of March, 1865, it was resolved "That it is desirable that an assistant-overseer for the parish be appointed by the proper authority, with a salary of 20*l.* a year, and that Mr. S. F. Assiter is a

proper person to be appointed, and that he be recommended for that office."

3. Assiter was on the 3rd of April, 1865, duly appointed assistant-overseer of the parish by two justices of the peace, in pursuance of the statute 59 Geo. 3, c. 12, s. 7. The warrant of appointment recited that Assiter was on the 25th of March, 1865, duly nominated and elected by the inhabitants of West Malling in vestry assembled to be assistant-overseer of the poor of the parish; that the inhabitants did determine and specify the following duties of overseer of the poor to be executed and performed by him, viz. "to assist the churchwardens and overseers in making, assessing, and levying the poor-rates of the parish, and to collect the poor-rates, keep the accounts, and transact all the ordinary duties of an overseer of the poor;" and that the inhabitants did also fix "the yearly salary of Assiter to be the sum of 20*l.* for his execution of the said office."

4. By bond, dated the 30th of June, 1865,—the bond sued on,—the defendant and one J. Billson became jointly and severally bound to the plaintiffs in the sum of 300*l.*, conditioned for the performance by Assiter of the duties of the office of assistant-overseer. The bond recited that Assiter had been appointed an assistant-overseer of the parish of West Malling, which is comprised within the Malling Union, and the duties to be by him executed and performed had been duly defined, as follows,—"To assist the churchwardens and overseers in making, assessing, and levying the poor-rates of the parish, to collect the poor-rates, keep the accounts, and transact all the ordinary duties of an overseer, at a salary of 20*l.*, payable quarterly," and had been required to give security to the guardians of the union for the faithful execution of his office; that Assiter had requested Graham and Billson to join with him as sureties in the above-written bond, subject to the condition thereunder written, to which they had assented, and had agreed that the bond should continue in force notwithstanding any change should be made thereafter in the salary of such assistant-overseer, either with reference to the amount or the mode of estimating the same, whether by fixed salary or by per-centage; and that the guardians had agreed to accept them as such sureties. The condition was as follows: "That, if the above-bounden assistant-overseer

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shall diligently, honestly, and faithfully perform and discharge all the duties of his office, and obey, subject to the rules of the Poor Law Board, in all matters relating to the duties of his office, all directions of the majority of the overseers of the parish; and also duly and punctually keep all necessary and proper books," and make entries and produce such books for inspection when required; and duly preserve books, deeds, securities, papers, &c., &c., and all other goods and property of the parish "which shall come to his hands or be in his custody or power as such assistant-overseer; and when thereunto lawfully required shall pay the balance then remaining in the hands of or due from him the said assistant-overseer, and hand over and deliver all such books, deeds, securities, papers, writings, goods, chattels, or other property as aforesaid to the successor of the said assistant-overseer, or to the overseers, or to such person or persons as the inhabitants of the parish in vestry assembled shall authorize and appoint to receive the same,—then the above-written obligation shall be void."

5. At a vestry meeting of the 26th of March, 1866, it was resolved "That Mr. Assiter be recommended to the board of guardians of the Malling Union, to be assistant-overseer of this parish at a salary of 25*l.* a year."

6. At a meeting of the board of guardians of the Malling Union, of the 4th of April, 1866, it was ordered that "Assiter be and is hereby appointed collector of poor-rates for the parish of West Malling, at a poundage of 6*d.*"

7. The clerk to the guardians of the Malling Union thereupon wrote to the Poor Law Board, reporting the appointment of Mr. Assiter, at a poundage of 6*d.*, and requesting the Poor Law Board to approve the appointment.

8. In answer to this, the secretary to the Poor Law Board wrote requesting that the particulars of the appointment of Assiter as collector of poor-rates might be communicated to the board in an inclosed form.

9. The particulars of the appointment of Assiter were duly communicated to the Poor Law Board, in the form sent for that purpose. (1)

(1) The material parts of this form were as follows:—

"1. State the christian name and surname of the person appointed collector. 12. The amount of salary or other remuneration proposed. 13. The

10. The secretary to the Poor Law Board wrote to the clerk to the guardians, on the 11th of May, 1866, directing attention to the order of the Poor Law Commissioners of the 18th of August, 1836, which provides that the collectors appointed under it shall be paid a poundage not exceeding 4*d.* in the pound on all sums exceeding 3*l.*, and of 8*d.* in the pound on all sums equal to or less than 3*l.* and requesting that the board might be furnished with explanatory observations in reference to Assiter's proposed remuneration.

11. The order of the Poor Law Commissioners dated the 18th of August, 1836, referred to in the foregoing letter, was duly made, and was not rescinded or quashed before the 7th of May, 1839.

12. After some further correspondence between the guardians and the Poor Law Commissioners, the commissioners assented to the appointment of Assiter and his rate of remuneration, and made the following order on the 11th of June, 1866:—

"Malling Union, Parish of West Malling. } To the Guardians of the Poor of the Malling Union, &c.

"Whereas, by an order dated the 18th day of August, 1836, the Poor Law Commissioners ordered and directed that the guardians of the Malling Union should, within one month from the date of the said order, appoint one or more fit and proper persons to be collector or collectors of the poor-rates of such of the several parishes comprised therein as the said guardians might deem to require a collector; and the said commissioners thereby further ordered and directed that every such collector should be paid according to certain rates of poundage therein mentioned: And whereas the guardians of the said union have appointed a fit and proper person to be the collector of the poor-rates for the parish of West Malling, within the said union, pursuant to the said recited order, and it is expedient that the poundage directed by the said

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nature and amount of security. The names and addresses of the sureties, and their occupations. 16. The authority under which the present appointment is made."

The answers to these questions were as follows:—

"1. Staines Fisher Assiter. 12*s.* 6*d.* in the pound on sums collected. 13. Bond with two sureties, in 300*l.* Allen Marden Graham, West Malling, Esq., Jonathan Billson, West Malling, builder. 16. Order of Poor Law Commissioners."

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recited order to be paid to such officer for the said parish should be altered as hereinafter mentioned: Now, therefore, in pursuance of the power given in and by the statutes in that behalf made and provided, We, the Poor Law Board, hereby order and direct as follows:—

"Article 1. The said guardians shall, unless the Poor Law Board otherwise direct, pay to the collector for the time being appointed under the authority of the said recited order, for the said parish of West Malling, for the performance of the duties of such office, a salary by means of a poundage at the rate of 6*d.* in the pound on all poor-rates collected by him.

"Article 2. The poundage of every such collector shall be calculated by the said guardians at the several quarters ending at the usual feast days in the year, &c., upon the amount which the said guardians shall ascertain to have been collected by such collector in the quarter then last ended, and shall be paid by the said guardians at such times accordingly; and the amount so paid shall be charged by them to the account of the said parish.

"Article 3. Provided, nevertheless, that the said guardians may defer the payment of the salary in whole or in part of such collector until his accounts shall have been audited and allowed by the auditor; after which audit and allowance the sum due up to the date of his accounts so audited shall forthwith be paid."

15. The Poor Law Board made another order on the 25th of June, 1866, by which they rescinded the order of the 18th of August, 1836, "except so far as the same relates to the parishes of East Peckham, Mereworth, West Malling, and Wrotham, for which parishes collectors appointed by the guardians of the said union are now acting."

16. No additional or different duties were imposed on Assiter by the appointment as collector under the orders of the 18th of August, 1836, and the 11th of June, 1866, or either of them, otherwise than appeared by those orders. Assiter, after that appointment, continued to perform the same duties as he had performed under the appointment of the 3rd of April, 1865, set forth in par. 3; which latter appointment was never rescinded, unless the appointment under the orders of the 18th of August, 1836, and the 11th of June, 1866, or either of them, rescinded it.

17. Assiter collected poor-rates for the parish of West Malling from the 25th of March, 1865, until the 16th of January, 1868: but, from and after the 28th of September, 1867, no "collecting and deposit book" was kept by Assiter in the ordinary and regular manner, nor was any book or other document at any time delivered or produced by Assiter to any of the parish officers, or to the auditor, as being or intended to be in the nature of such a book.

18. Out of the money collected by Assiter for the poor-rates of the parish he from time to time paid to the treasurer of the Malling Union the amount of certain orders or calls made upon the overseers of the parish of West Malling by the guardians of the union. He also made certain other payments, and received certain allowances. During the year beginning on the 25th of March, 1865, and ending on the 25th of March, 1866, Assiter was paid or allowed a salary of 20*l.* as assistant-overseer. From the 25th of March, 1866, to the 16th of January, 1868, he was paid or allowed a poundage of 6*d.* in the pound on the amounts collected by him.

20. On the 16th of January, 1868, there remained in the hands of Assiter a balance, on account of poor-rates collected by him, of 231*l.* 2*s.* 5*d.* This balance had never been paid over by him.

21. It was agreed that the pleadings should form part of the case; and that the Court should be at liberty to draw any inferences or find any facts which in the opinion of the Court a jury ought to have drawn or found.

The question for the opinion of the Court was, whether, under the facts above stated, the plaintiffs were entitled to recover in this action.

Montagu Chambers, Q.C. (*Barrow* with him), for the plaintiffs. The question is whether the defendant is discharged from his liability by the fact of Assiter's having been appointed collector of poor-rates, with precisely the same duties to perform as those which the defendant guaranteed. The case might have been different if the two offices had been inconsistent and incompatible. But these clearly are not so; for, the case expressly finds (par. 16) that no additional or different duties were imposed on Assiter by

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the second appointment, and that he continued to perform precisely the same duties as before.

[BOVILL, C.J. The appointment as assistant-overseer was on the election of the vestry; the appointment of collector of rates was by the Poor Law Board on the nomination of the guardians of the union. The duties may be the same; but the officer is subject to a different sort of control. The bond is given to the guardians of the union, whereas the appointment is made by the Poor Law Board, on the nomination of the guardians.]

The office to which Assiter was appointed on the 3rd of April, 1865, never in fact ceased. He continued to collect as assistant-overseer of the parish. His appointment was under 59 Geo. 3, c. 12, s. 7 (1); and it has never been revoked by the vestry, nor did he resign it. Even if the duties under the second appointment were different from or incompatible with those which he had to perform under the first, the surety is not discharged. By 7 & 8 Vict. c. 101, s. 61, the old office is not to cease unless so directed by the Poor Law Board; and the bond is to be put in suit by the guardians of the union. That the mere alteration in the salary or mode of remuneration would not discharge the sureties, is clear from *Frank* v. *Edwards*. (2) In *Bamford* v. *Iles* (3), the original appointment was only for a year. In *Worth* v. *Newton* (4), it was held that the acceptance by the holder of one office of another incompatible office, does not necessarily vacate the former. Assiter did not receive the rates as mere collector under the appointment

(1) 59 Geo. 3, c. 12, s. 7:—"It shall be lawful for the inhabitants of any parish in vestry assembled to nominate and elect any discreet person or persons to be assistant-overseer or overseers of the poor of such parish, and to determine and specify the duties to be by [him] or them executed and performed, and to fix such yearly salary for the execution of the said office as shall by such inhabitants in vestry be thought fit; and it shall be lawful for any two of His Majesty's justices of the peace, by warrant under their hands and seals, to appoint any person or persons who shall be so nominated and elected to be assistant-overseer or overseers of the poor, for such purposes, and with such salary as shall have been fixed by the inhabitants in vestry;" "and every person or persons so appointed shall continue to be an assistant-overseer of the poor until he or they shall resign such office, or until his or their appointment shall be revoked by the inhabitants of the parish in vestry assembled, and no longer." Then follow provisions for security.

(2) 8 Ex. 214; 22 L. J. (Ex.) 42.

(3) 3 Ex. 380.

(4) 10 Ex. 247; 23 L. J. (Ex.) 338.

of the Poor Law Board; but he received them as assistant-overseer. He never was relieved from the performance of the duties he owed to the parish. If it be said that the mode of accounting and paying over is different, that is met by the observations of Parke, B., in *Worth* v. *Newton*. (1) Here, the second appointment was under the Poor Law Order of the 18th of August, 1836, and not under s. 62 of 7 & 8 Vict. c. 101.

Denman, Q.C. (*Hayman* with him), for the defendant. The original appointment was in the most general form, and it would seem to be for one year only. At all events, the appointment of the 4th of April, 1866, apart from the change of salary, put an end to the former one. The case therefore is distinguishable from *Bamford* v. *Iles* (2) and *Holland* v. *Lea*. (3) On the appointment of Assiter as collector of rates, his original appointment as assistant-overseer, whether limited to a year or not, ceased. His appointment as collector at a poundage of 6*d.* was complete on the assent of the Poor Law Board being given to that mode of remuneration.

[WILLES, J. If the appointment was an appointment within s. 61 of 7 & 8 Vict. c. 101, then it would cease only "if so directed" by the Poor Law Board. If under s. 62, it would cease "unless otherwise directed" by them. Whether it was made under the one section or the other, would depend upon whether the order of the Poor Law Board of the 11th of June, 1866, was a direction by them.]

The appointment was clearly under s. 62 (4): it was made in

(1) 10 Ex. at p. 257; 23 L. J. (Ex.) at p. 542.

(2) 3 Ex. 380.

(3) 9 Ex. 430; 23 L. J. (Ex.) 122.

(4) 7 & 8 Vict. c. 101, s. 62, enacts that, "if the board of guardians of any parish or union make application to the commissioners to direct the appointment of a paid collector of the poor-rates in such parish or union, or in any parish or parishes of such union, it shall be lawful for the commissioners, by order under their hands and seals, to direct the said board of guardians to appoint such a collector; and the commissioners shall have the same powers with respect to such collectors as are given to them by 4 & 5 Wm. 4, c. 76, with respect to paid officers; and all powers of the inhabitants of any parish in vestry assembled, or of justices of the peace, or of any persons other than the board of guardians of such parish or union, to appoint any collector for any such parish as aforesaid, and (except when otherwise directed by the commissioners) all appointments under such powers, shall cease."

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consequence of the application of the board of guardians after the 4th of April, 1866, and could not have been made without the sanction of the Poor Law Board. This matter was very fully discussed in *Reg.* v. *Greene.* (1) Lord Campbell, C.J., in giving judgment, says: "We do not see how we can give effect to the act without holding that an appointment in fact of a collector or assistant-overseer, or both, by the guardians of the union under an existing unrescinded order of the Poor Law Board, takes away the power of the vestry under stat. 59 Geo. 3, c. 12."

Then, the two offices are altogether incompatible. The mode of appointment is different; the accountability is different; and the remuneration is different, and paid out of a different fund,—the funds of the parish in the one case, those of the union in the other. These objections were inapplicable in the cases of *Frank* v. *Edwards* (2) and *Worth* v. *Newton.* (3) The former merely decided that a reduction of the salary did not relieve the surety, and the latter that the appointment to the office of overseer did not operate as a resignation of that of assistant-overseer. *Points* v. *Attwood* (4) shews that an assistant-overseer who is appointed in general terms under 59 Geo. 3, c. 12, s. 7, is for all practical purposes an overseer.

Montagu Chambers, Q.C., in reply. The second appointment was not made under s. 62 of 7 & 8 Vict. c. 101, but under the poor-law order of the 18th of August, 1836. No application was made by the guardians of the union to the Poor Law Board to appoint a collector of rates under that section: the Poor Law Board themselves initiated the matter. The order of the 11th of June, 1866, is a general order, not one made on the application or at the request of the guardians at all. The original appointment of Assiter is still subsisting, notwithstanding there may have been some alteration as to the persons to whom Assiter was to account and the persons having power to dismiss him, and as to some other minor details. None of the duties to be performed by him under the second appointment are inconsistent with those which devolved upon him under the first. The case so finds in express terms.

(1) 17 Q. B. 793, 815; 21 L. J. (M.C.) 137, 144.

(2) 8 Ex. 214; 22 L. J. (Ex.) 42.

(3) 10 Ex. 247; 23 L. J. (Ex.) 338.

(4) 6 C. B. 38.

And, if they were, the authorities already referred to shew that the position of the surety is not thereby altered or his liability discharged.

Then, as to 59 Geo. 3, c. 12, s. 7, there clearly was no resignation by Assiter of the original appointment, nor any revocation of his appointment by the vestry.

Cur. adv. vult.

Jan. 21. BOVILL, C.J. The defendant became surety for one Assiter who was appointed assistant-overseer of the parish of West Malling on the 3rd of April, 1865. He is sued upon a bond given upon that occasion to the guardians of the Malling Union, for breaches of that bond,—substantially for defalcations on the part of the assistant-overseer as collector of the rates. The defendant, being a surety, is only responsible according to the condition of the bond, and for the time that Assiter held the appointment in respect of which the bond was given, and for Assiter's acts and defaults in that particular employment. If that employment is at an end, or the defaults complained of occurred in any other employment or capacity, the defendant is not responsible. The question then arises as to the position filled by Assiter at the time the defalcations occurred.

Now, it is clear that Assiter was elected assistant-overseer by the inhabitants of the parish of West Malling in vestry assembled, and appointed by the magistrates, pursuant to 59 Geo. 3, c. 12, s. 7. In the warrant of appointment given by the magistrates on that occasion, his duty is defined thus,—"to assist the churchwardens and overseers in making, assessing, and levying the poor-rates of the parish, and to collect the poor-rate, keep the accounts, and transact all the ordinary duties of an overseer of the poor;" and his salary or remuneration was fixed by the vestry at 20*l.*, which was clearly a salary of 20*l.* per annum, a yearly salary. The duties to be performed by Assiter are further defined and described in the condition of the bond. [His Lordship read the condition.] Under the election and appointment so made by the vestry and the justices, Assiter entered upon the performance of the duties of the office. He was appointed as assistant-overseer at a salary of 20*l.* per annum. So far as the statements in the special

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case go, it does not appear that he performed any other duty than that of collector of poor-rates.

Now, what was the nature of his employment? It was clearly an employment by the parish. He was to be paid by the parish; he might be dismissed by the parish,—with an additional power of dismissal by the Poor Law Commissioners under 4 & 5 Wm. 4, c. 76, s. 46. So far as his original appointment is concerned, Assiter was bound to obey the orders of the overseers. His duties were altogether of a parochial character. Whether we look to his original appointment, the mode of payment of his salary, or the duties which he had to perform, he was clearly responsible to the parish.

Towards the close of the first year of his service, the parish were desirous that he should be appointed by the board of guardians of the Malling Union; and accordingly at a vestry meeting held on the 26th of March, 1866, it was resolved that Assiter be recommended to the board to be appointed assistant-overseer of West Malling at a salary of 25*l.* a year. Now, it was perfectly competent to the board of guardians to appoint whom they pleased as assistant-overseer and collector of rates. If a third person had been appointed by them, the powers and duties of Assiter as an officer of the parish would have entirely ceased. Looking at the provisions of the Act of Parliament, and at the facts, I think that is clear. The two appointments would have been incompatible and inconsistent, and could not have stood together.

The parish having thus recommended the appointment of Assiter as assistant-overseer at a salary of 25*l.* per annum, the board of guardians on the 4th of April passed a resolution that he should be appointed, not assistant-overseer, but collector of poor-rates. They do not adopt the salary proposed, of 25*l.* per annum, but they resolve that he shall be paid by a poundage of 6*d.* That appointment, however, was of no avail unless sanctioned by the Poor Law Commissioners; and, when submitted to them, they did not think fit to approve of it, the rate of remuneration not being in accordance with the poor-law order of 18th August, 1836, which provided that the poundage for collection should not exceed 4*d.* in the pound on sums exceeding 3*l.*, and 8*d.* in the pound on sums equal

to or less than 3*l*. After some correspondence on the subject, the Poor Law Commissioners at length assent to the proposed scale of remuneration, and an order was made by them on the 11th of June, 1866, sanctioning that mode of payment. From that time Assiter proceeded to collect the poor-rates for the parish of West Malling, and he became of course liable to all the provisions of the statutes as collector of poor-rates appointed by the board of guardians of the Malling Union. That clearly was an appointment of a nature different from that which he before held. The parish ceased to be his employers or his pay-masters. They no longer had any control over him, nor any power to dismiss him. He ceased to be the servant of the parish, and became the servant of the board of guardians, subject to the orders of the Poor Law Board.

It has been argued that the duties of the two offices were not incompatible. I think, however, that they clearly are incompatible; and that incompatibility is best shewn by putting the case of two persons appointed, one by the vestry, the other by the board of guardians, to collect the rates; and, if it had stood upon that alone, I should have been prepared to hold that the first appointment was put an end to. But it is not necessary to determine that, because the first appointment was subject to be put an end to by a resolution of the vestry or by the resignation of Assiter; and, looking at what occurred at the vestry of the 26th of March, 1866, when they recommend to the guardians the appointment of Assiter, and to the subsequent conduct of Assiter, I come to the conclusion that there was both a revocation of the first appointment by the vestry and a resignation by Assiter. If so, there is an end of the plaintiffs' case. The money which Assiter is charged to have received and to have failed to account for was not in truth received by him under the appointment in respect of which the defendant became surety. The guardians have treated the old bond as still subsisting. They were probably led into this mistake by the paper of questions sent to them by the Poor Law Board, and which they treated as an inquiry as to what existing securities they had. For the reasons above given, I am of opinion that our judgment must be for the defendant.

I also think the argument that the first appointment ceased by

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virtue of s. 62 of 7 & 8 Vict. c. 101, is well founded. It seems to me that that section applies to appointments made after the passing of the Act. It is future in its application. The second appointment of Assiter was made after the passing of that Act: but it is contended that it was not made in pursuance of an order made by the Poor Law Board after the passing of that Act. The answer is, that it certainly was not made in pursuance of an order made before the Act, because the order of 18th August, 1836, did not authorize the appointment of a collector of rates upon the terms on which this appointment was made. The Poor Law Board issue a fresh order on the 11th of June, 1866. That order is subsequent to 7 & 8 Vict. c. 101. Therefore we have an order made subsequent to the statute, and a resolution of the board of guardians appointing Assiter, and an assent to that appointment by the Poor Law Board after the statute. The only question is whether this order of 1866 is an order directing the appointment on the new terms. I think it is. It incorporates the order of August, 1836, and therefore that order must be treated as an order of 1866.

As to the prior application to the Poor Law Board, I think the resolution of the board of guardians of the 4th of April, 1866, appointing Assiter to be collector, and the letter communicating that appointment to the Poor Law Board, was an abundant compliance with the requirement of s. 62. The order of the Poor Law Board of the 11th of June, 1866, seems to me to have been an order under their hands and seal directing the board of guardians to appoint a collector; and under these circumstances the Act (7 & 8 Vict. c. 101, s. 62) provides that "all powers of the inhabitants of any parish in vestry assembled, or of justices of the peace, or of any persons other than the board of guardians of such parish or union, to appoint any collector for any such parish as aforesaid, and (except when otherwise directed by the said commissioners) all appointments under such powers, shall cease." If, therefore, the second appointment of Assiter was within the first part of s. 62, the case falls within the latter part also, and the defendant is entitled to judgment on this ground.

WILLES, J. I am entirely of the same opinion.

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BRETT, J. This is an action on a bond whereby the defendant became surety for the due performance by one Assiter of the duties of the office of assistant-overseer of the parish of West Malling; and breaches are charged, substantially that Assiter failed to account for moneys received by him as collector of poor-rates, which was one of the duties of his office. The defendant contends that, before the defalcations charged took place, Assiter had ceased to be assistant-overseer, and that the defalcations took place while he was acting as collector of rates under a subsequent appointment by the board of guardians. Upon that defence issue is taken.

It seems to me that the only real question is whether Assiter had ceased to be assistant-overseer. I think it is not open to the defendant to contend that, if he continued to be assistant-overseer under the original appointment, his duties had been so altered that the position of the defendant as surety was changed so as to absolve him from liability. The only question, then, is whether Assiter continued to be assistant-overseer, and the duties for the breach of which the action is brought were duties performed by him as assistant-overseer. I think it is quite clear that the original appointment was not intended to endure for one year only. The appointment was general, and at a yearly salary; and there were only three modes of putting an end to it,—first, by resignation; secondly, by revocation by the vestry; thirdly, by mutual consent of the parties.

Upon the facts stated, I think it might very well be held that the appointment was put an end to by mutual consent. But, inasmuch as the case has not been framed with that view, I doubt whether that would be a safe or satisfactory conclusion to arrive at.

The ground on which I think the case ought to be decided in favour of the defendant is, that the appointment was put an end to under s. 62 of 7 & 8 Vict. c. 101. I think the case is clearly brought within that section. It is true that the guardians at first proposed that Assiter should be appointed collector of rates under the Poor Law Order of the 18th of August, 1836. But, it being pointed out to them by the Poor Law Board that their proposed appointment was not in accordance with the terms of that order,

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and that, if they wanted the Poor Law Board to sanction the appointment of a collector on the terms of remuneration they suggested, viz. 6*d.* in the pound on all sums received, they must ask the board to alter the order of 1836, the board of guardians did practically ask the Poor Law Board to appoint Assiter collector at a remuneration of 6*d.* in the pound; and the Poor Law Board accordingly made the order of the 11th of June, 1866.

It therefore seems to me that there was an order by the Poor Law Board which would enable the guardians to make the appointment, and that the appointment was made with their assent. The appointment was therefore made in pursuance of an order of the Poor Law Board issued on the application of the board of guardians.

Under these circumstances, the 62nd section provides that the original appointment shall cease from that moment; consequently, Assiter by force of that section was no longer assistant-overseer of the parish of West Malling, and became only collector of rates; and the second and third pleas are made out.

Judgment for the defendant.

Attorneys for plaintiffs: *Fearon, Clabon, & Fearon.*
Attorneys for defendant: *Norton & Son, Town Malling.*

[REGISTRATION CASES.] *

1869
Nov. 23.

KIRTON, APPELLANT; DEAR, RESPONDENT.

Parliament—County Vote—Qualification—Freehold Benefice.

Part 22

A. claimed a vote for a county in respect of the incumbency of a district church. As incumbent he had the freehold of the church and was entitled to annual stipends of 150*l.* and 50*l.* from the Ecclesiastical Commissioners and Governors of Queen Anne's Bounty, respectively, paid out of funds which did not arise from land within the parish in which he claimed to be registered; to fees on the burial in a cemetery, also out of the parish, of persons dying within the district attached to the church; and to fees for marriages, baptisms, and churchings, performed within the church; each of which amounted to more than 40*s.* a year:—

Held, that he was not entitled to a vote.

APPEAL from the Revising Barrister for the county of Middlesex.

Charles Kirton duly claimed to have his name inserted on the list of voters for the county in respect of a freehold benefice, known by the name of St. Andrew, Bethnal Green, situate in the parish of St. Matthew, Bethnal Green, and was duly objected to by Frederick Dear.

Kirton was duly appointed by licence of the Bishop of London, dated the 10th of June, 1864, to the office of perpetual curate or incumbent of the church of the perpetual curacy of St. Andrew, Bethnal Green, and he was by the licence authorized to receive and enjoy all and singular stipends, profits, and advantages whatsoever belonging to the office. The district chapelry attached to the church of St. Andrew was assigned to it by an order in Council, dated the 3rd of April, 1843, under the authority of statutes 58 Geo. 3, c. 45, 59 Geo. 3, c. 134, 7 & 8 Geo. 4, c. 72, 1 Vict. c. 75. By another order in Council, dated the 10th of June, 1843, made under the statutes 3 & 4 Vict. c. 113, and 4 & 5 Vict. c. 39, the annual sum of 150*l.* was ordered to be paid by the ecclesiastical commissioners to the incumbent for the time being of the church of St. Andrew, Bethnal Green. By another order in Council, dated the 8th of August, 1853, under 3 & 4 Vict. c. 113, and 2 & 3 Vict. c. 49,

* For convenience of reference, the Registration Cases for this year are all collected here, irrespective of the Term in which they were decided.

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it was ordered that a further sum of 50*l.* should be paid to such incumbent by the treasurer of the governors of the Bounty of Queen Anne, out of a sum of 475*l.*, charged, as therein mentioned, on the tithes, or payments in lieu thereof, part of the revenue of the rectory of St. Andrew Undershaft with St. Mary Axe, in the city of London. Under the before-mentioned order in Council of the 3rd of April, 1843, Kirton, as incumbent for the time being, was entitled and in receipt of the fees paid in respect of marriages, baptisms, and churchings, performed in the church, and the income arising from such fees was more than 40*s.* per annum over and above all rents and charges payable out of or in respect of the same. Kirton was also in the receipt of fees paid in respect of the burials in Bow cemetery of persons dying within the district attached to the church of St. Andrew. The income from such burial fees amounted to more than 40*s.* a year over and above all rents and charges payable out of or in respect of the same. No assignment of pew rents had at any time been made to Kirton, and Kirton was not in receipt of any income from pew rents or the letting of pews.

The revising barrister was of opinion that Kirton was not, in right of his office of perpetual curate or incumbent of the said church (irrespectively of the source from which the income coming to him in right of his said office was derived), entitled to have his name inserted in the list of voters for the county; and he was also of opinion that Kirton was not by virtue of his office seised of or entitled either at law or in equity to a freehold estate in lands or tenements in the same county and the same parish as that in which he claimed to be registered of the clear annual value of 40*s.* over and above all rents or charges payable out of or in respect of the same; and he therefore disallowed the vote.

If the Court should be of opinion that his decision was wrong, the register was to be amended by inserting the name of Kirton.

Sir J. Karslake, Q.C. (*Morgan Howard* with him), for the appellant. It is admitted that the appellant has an estate of freehold in the church, and the only question is whether it can be considered of the value to him of 40*s.* by the year as required by 8 Hen. 6, c. 7. There can be no doubt that the site alone of the

church is worth far more than that, but it will be contended that it is not of that value to the appellant unless some of the sources of income mentioned in the case can be considered as annexed to it. They are received by the appellant in right of his office as incumbent, and the office is a local one situated in the parish of St. Matthew, Bethnal Green, and so, though the stipends of 150*l.* and 50*l.* do not arise from any lands within the parish, they give value to the office which is within it. The same may be said of the payments in respect of Bow cemetery which are made under 4 & 5 Vict. c. lxiii. In any case the fees for marriages, baptisms, and churchings performed in the church are sufficiently connected with it to make it of value to the the appellant, and to bring him within the words of 8 Hen. 6, c. 7, as one who "shall have free land or tenement to the value of 40*s.* by the year above all charges."

Simon, Serjt. (*Michael* with him), for the respondent. The whole question is, whether any of the emoluments received by the appellant issue out of land within the parish of St. Matthew, Bethnal Green; for it has been long decided that a freehold office does not entitle the holder to vote if the emoluments are not derived from land within the district for which the claim to vote is made. This was held, amongst others, respecting an organist, the masters in chancery, and a parish clerk, in the *Middlesex Case* (1), and was affirmed by this Court in *Bushell* v. *Eastes.* (2) With respect to the fees for services performed in the church, these cannot be claimed as of common right by the incumbent in respect of his incumbency, but are payable either by custom or Act of Parliament for the personal services of the clergyman. They cannot be claimed if the services are not performed by him: *Burdeaux* v. *Lancaster* (3); *Patten* v. *Castleman* (4); *Topsall* v. *Ferrers* (5); *Spry* v. *Gallop* (6); and are not due for the use of the church: prior to Lord Hardwicke's Act, 26 Geo. 2, c. 33, the services need not even have been performed in the church.

Sir J. Karslake, Q.C., in reply.

(1) 2 Peck. 91, 92.
(2) 11 C. B. (N.S.) 106; 31 L. J. (C.P.) 44.
(3) 1 Salk. 332.
(4) 1 Lee Ecc. Cases, 387.
(5) Hob. 175.
(6) 16 M. & W. 716.

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BOVILL, C.J. It is not disputed that Kirton, as incumbent, was possessed of a freehold office and entitled to the freehold of the church; as such incumbent he was also entitled to receive certain emoluments, namely—1st, a stipend of 150*l.* paid by the ecclesiastical commissioners; 2nd, an annual sum of 50*l.* paid by the governors of Queen Anne's Bounty; 3rd, certain fees for marriages, baptisms, and churchings performed in the church; and 4th, certain payments in respect of persons buried in Bow cemetery who had died in his district. In respect to these emoluments we are asked to hold that one or more of them are derived, not from his office, but from land within the parish in which the church stands. With respect to the church itself, it is not found to be of any value, nor does it produce any profit unless the fees for the services performed in it can be considered as such; there are no pew rents, nor could the incumbent exact them if he wished it. Then, is the land to which the incumbent is entitled a source of any of the profits referred to? This could not be argued with any chance of success with respect to the stipends of 150*l.* and 50*l.*, or the fees paid in respect of burials in Bow cemetery. The only point on which there could be any doubt is with respect to the fees for marriages, baptisms, and churchings performed in the church itself. These payments are made when services are performed; they have no direct connection with the land, and do not arise out of it. They are made on account of some custom or Act of Parliament for the personal services of the clergyman, and not for the use of the land. It is true that, as to some of the services, they must be performed within the church; but the payments probably had their origin as customary payments before this was the case. I think, therefore, on the whole that the appellant has not shewn that he is possessed of any land which is of the required value to him.

WILLES, J., not having heard the whole of the argument, took no part in the judgment, but expressed his concurrence.

KEATING, J. I am of the same opinion. The only point on which Sir John Karslake seriously insisted, was the title of Mr. Kirton to fees in respect of marriages, baptisms, and churchings performed in his church, and it was argued that, as they were per-

formed in the church, they enhanced its value. I think my Brother Simon assigned the true origin to them when he said they did not arise of common right, but could only be claimed by custom, unless given by Act of Parliament; that has been clearly settled in *Bryant* v. *Foot*. (1) My Brother Simon was right also in saying that the payment was and still is in respect of the services performed, wholly independently of where they are performed, and I think the annexation of the services to particular places does not cause the fees to issue out of those places in such a sense as to entitle the person receiving them to a county vote.

BRETT, J. I think, since the Registration Act, 6 Vict. c. 18, a claimant must not only shew that he has lands or tenements within the county, but that he has them within the parish where he makes his claim. In this case I understand the question to be, whether the appellant is the owner of land of the value of 40*s*. a year. It is clear that the church is in itself of no value to him, and in order to give value to it several matters have been relied on. With respect to the stipends of 150*l*. and 50*l*., it is sufficient to say that they do not arise out of land within the parish, even if they can be said to arise out of land at all. So, as regards the cemetery fees, the cemetery is not within the parish, even if the fees arise out of it. The only fees on which any reliance can be placed are those for marriages, baptisms, and churchings performed within the church. But the cases cited by my Brother Simon shew that these fees were formerly paid for the personal services of the clergyman, and it could not, before Lord Hardwicke's Act, 26 Geo. 2, c. 33, have been even contended that they arose out of the land. The only question, therefore, is, whether that Act has altered the case, and made them any more a payment for the use of the church than before. I think not, but that they are still customary payments for the services of the clergyman. The claimant, therefore, has not made out that he has free land or tenements to the value of 40*s*. by the year, and the appeal must be dismissed.

Decision affirmed. (2)

Attorneys for appellant: *Marrictt, Jordan, & Cooper.*

Attorneys for respondent: *J. Robinson.*

(1) Law Rep. 3 Q. B. 497. (2) See the next case.

1870
Jan. 26.

WALLIS, Appellant; BIRKS, Respondent.

Parliament—County Vote—Perpetual Curate—Equitable Freehold.

Lands of the value of 40s. per annum were duly conveyed in 1856 "to the use of C. and his successors, vicars of the vicarage of Holy Trinity, Cambridge, for the time being, for ever." The incumbency was only a perpetual curacy; and the respondent became, in 1866, incumbent as perpetual curate, and claimed to be entitled to vote for the county in respect of the land so conveyed:—

Held, that he was entitled to vote for the county, as he had at least an equitable freehold in the land.

Appeal from the Revising Barrister for the county of Cambridge.

The appellant objected to the name of the respondent being inserted in the list of voters for the parish of Burwell.

The respondent was the incumbent, as perpetual curate, of the parish of the Holy Trinity, Cambridge. He was licensed, upon due presentation thereto, on the 5th of January, 1866, as appeared by an instrument under the hand and episcopal seal of the Bishop of Ely, which authorized him "to perform the office of perpetual curate or incumbent of the perpetual curacy of the Holy Trinity, Cambridge, and to receive and enjoy all and singular stipends, profits, and advantages whatsoever belonging to the said office."

He claimed to be on the register of voters in respect of freehold land at Burwell, of more than the clear annual value of 40s., which had been taken in exchange for other land attached to the perpetual curacy.

By indenture of exchange dated the 2nd of September, 1856, and made between Thomas Morland and Conrad Wilkinson of the first part, the Bishop of Ely, ordinary, patron of the vicarage of the parish of Holy Trinity, Cambridge, of the second part, and the Rev. Charles Clayton, clerk, incumbent of the said vicarage, of the third part, after various recitals, and after reciting 55 Geo. 3, c. 147, it was witnessed that, in pursuance of a therein-recited agreement, and for the considerations therein mentioned, Morland and Wilkinson, with the consent of the Bishop of Ely as ordinary and patron of the vicarage, upon the acceptance of Clayton, as incumbent, with the consent of the ordinary and patron, did

grant, bargain, sell, and exchange unto Clayton, and his successors, vicars of the said vicarage for the time being, for ever (inter alia), All that piece or parcel of land situate, lying, and being in Burwell, containing by admeasurement 2*a.* 1*r.* 15*p.*, then or late in the occupation of James Scott, together with the appurtenances thereto belonging, To hold the same, with their appurtenances, unto and to the sole use and benefit of Clayton and his successors, vicars of the said vicarage of Holy Trinity aforesaid for the time being, for ever.

No proof was given of any augmentation from Queen Anne's bounty of such curacy.

The revising barrister decided that the incumbency, being a perpetual curacy, conferred upon the respondent a sufficient freehold estate in the property at Burwell (he receiving the rents thereof) to entitle him to a vote; and he allowed the claim accordingly.

If the Court should be of opinion that the respondent had a sufficient freehold interest in the land, his name was to be retained on the register; but, if otherwise, his name was to be erased.

O'Malley, Q.C., for the appellant. Though called a "perpetual curate," the respondent is not a perpetual curate, so as to make him a corporation sole, and to be thus able to take land by succession. He is a simple stipendiary curate, without augmentation from Queen Anne's bounty. In 2 Burn's Ecclesiastical Law, 9th ed. 55, it is said: "A perpetual curacy is not an ecclesiastical benefice, but is tenable with any other benefice: *Welden* v. *Green*, 1772. . . . If there be an impropriator and no vicar, but the church hath always been served by a curate appointed by the impropriator, he is called a perpetual curate; and yet, according to the common law, he is removeable at the pleasure of the impropriator: *Bott* v. *Brabason* (1); *Pawly* v. *Wiseman*. (2) And in the case of *Price* v. *Pratt* (3) it was holden per curiam that, though a curate called perpetual be appointed either generally or expressly for life, yet such appointment is in its own nature revocable at law, even without any cause assigned, and by the ecclesiastical law upon cause shewn; so that he had not such a permanent interest as to claim any tithes. And in all these cases it was holden that a

(1) Noy, 15. (2) 3 Keble, 614. (3) Bunb. 273; 1 Barnard. 233.

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curate could not claim tithes by the common law; and the several statutes, 17 Car. 2, c. 3, s. 7, 29 Car. 2, c. 1, ss. 1, 2, and 1 Geo. 1, st. 2, c. 10, s. 4, shew the law was so taken by the legislature, who have by those Acts enabled curates to take in perpetuity, in the particular cases provided for by those Acts." The whole law upon the subject is very fully gone into in *Greenslade* v. *Darby*. (1)

[WILLES, J. There is also an elaborate judgment in *Mason* v. *Lambert*. (2) The question in *Greenslade* v. *Darby* (1) was whether the freehold of the churchyard was vested in the perpetual curate. The Court held not; but it was clear that he had the use of it for all ecclesiastical purposes. Here, even if there was no proper creation of a corporation sole, the respondent had either a legal or an equitable freehold for life, and was entitled to be registered.]

Keane, Q.C., for the respondent, was not called upon.

PER CURIAM (BOVILL, C.J., WILLES and BRETT, JJ.). The decision of the revising barrister was right, and must be affirmed.

Decision affirmed.

Attorneys for appellant: *J. & C. Cole, for E. Foster, Cambridge.*
Attorney for respondent: *Isaacson, for J. Button, Newmarket.*

Feb. 23. BRUMFITT, APPELLANT; ROBERTS AND OTHERS, OVERSEERS OF LIVERPOOL, RESPONDENTS.

Parliament—County Vote—Pew in a Church—Easement—56 *Geo.* 3, *c. lxv*—2 *&* 3 *Vict. c.* 33 (*Private*)—*Practice—Overseers named Respondents—Notice of Appeal*—6 *Vict. c.* 18, *ss.* 43, 64.

Under the provisions of a private Act (56 Geo. 3, c. lxv) a church was built by certain subscribers and proprietors, in whom the freehold was vested. By the Act certain trustees were impowered "to let or sell and transfer and convey, for the purpose only of attending Divine service," certain of the pews and seats to the inhabitants of certain parishes, subject to the payment of rents and assessments, and with a power of entry for non-payment.

By a subsequent private Act (2 & 3 Vict. c. 33), reciting that doubts had arisen as to the estate and interest which the subscribers and proprietors of the church took in the pews, it was enacted that the fee-simple and inheritance of and

(1) Law Rep. 3 Q. B. 421. (2) 12 Q. B. 795; 17 L. J. (Q.B.) 366.

in the said pews should be vested in the said subscribers or the proprietors for the time being of the pews, their heirs and assigns for ever:—

Held, that the proprietor of a pew did not under either of these Acts acquire such a freehold interest in any portion of the soil of the church as to entitle him to a vote for the county; but merely an easement, or a qualified right to the occupation and enjoyment of the pew for the purpose of attending the services of the church.

Four persons, named, and described as "overseers of the parish," were made respondents in an appeal, and notice of prosecuting the appeal was duly served upon them all; but it turned out that only one of them was in fact overseer, upon which notice was served on the other overseers also. No respondent appearing:—

Held, that the appellant had done all that was necessary, under 6 Vict. c. 18, s. 64, to entitle him to be heard.

APPEAL from the Revising Barrister for the southern division of the county of Lancaster.

The appellant objected to the name of Matthew Redhead being retained in the list of voters for the said division. The name of Redhead appeared in the list of claimants in respect of a qualification described as "Freehold pews, 72 and 72½, St. Mark's Church, Upper Duke Street."

He produced a deed of the 29th of April, 1863, made between John Highfield of the one part, and himself of the other part. The deed, after reciting that Highfield was seised to him and his heirs of the said pews in the church of St. Mark, witnessed that Highfield did thereby grant and convey to Redhead and his heirs the said pews, and the sole and exclusive right of using the same at all times when Divine service should be performed in the church, and at all other reasonable times when the church should be opened for the use of persons frequenting the same, together with all ways, privileges, and advantages of passage in and through the aisles of the church, and all other advantages and appurtenances thereto belonging; and all the estate, &c., of Highfield therein or thereto,—habendum to Redhead, his heirs and assigns, for ever, subject to the payment of such yearly rents and such leys and assessments and other sums of money as should thereafter become due or be lawfully charged or imposed upon the said pews, or the owners or occupiers thereof, by virtue of "the Act of Parliament relating to the said church." There was also a covenant for title and quiet enjoyment.

It was admitted that Highfield derived his title to the pews

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from a deed made shortly after the passing of 2 & 3 Vict. c. 33 (private), by which the persons mentioned in s. 4 of that Act as "the subscribers to the said church of St. Mark," conveyed the pews to Highfield, and that the last-mentioned indenture was in its terms in all respects similar to the indenture of the 29th of April, 1863.

Before the conveyance to Highfield, the subscribers had not nor had the "commissioners and trustees" mentioned in 56 Geo. 3, c. lxv, conveyed any interest in the pews to any other person.

The church of St. Mark was established by 56 Geo. 3, c. lxv, intituled "An Act for establishing a New Church called the Church of St. Mark, situate in the Town and Parish of Liverpool, in the County Palatine of Lancaster."

Several sections of the Act were set out in the case at length; but the material parts are given in the judgment of the Court.

The pews in question are pews contained in the third schedule to that Act.

The 2 & 3 Vict. c. 33 (private) contains the provision, s. 4, which is set out at length in the judgment.

The pews in question are each of the annual value of 5*l.* after deducting all charges upon the same. Since April, 1863, Redhead has been in the habit of attending Divine service at the church of St. Mark, and occupying one of the pews during the time of service. No other person has at any time been allowed to use such pew without the permission of Redhead. The other of the pews has been since 1863 occupied in the same manner by persons to whom Redhead let the same, and who have regularly paid rent to him therefor.

The revising barrister was of opinion that Redhead had a freehold estate in the pews, or one of them, sufficient to entitle him to have his name retained on the list of voters; and he retained the name accordingly.

The question for the Court was, whether Redhead had a freehold estate sufficient to entitle him to have his name retained on the list.

Redhead declining to be respondent in this appeal, the revising barrister named the overseers of the parish of Liverpool respondents, under 6 Vict. c. 18, s. 43.

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Jan. 25. *Crompton*, for the appellant. (1) Nothing more passed under the conveyance to Redhead than the qualified sort of estate or easement which in *Hinde* v. *Chorlton* (2) was held to be insufficient to give a right to vote under 8 Hen. 6, c. 7. Although the circumstances of that case are somewhat different, the principle of the decision is clearly applicable here. The subscribers and proprietors had no estate of inheritance in the pews in question; and, if they had, the grant to Highfield and from Highfield to Redhead neither conveyed nor professed to convey any such estate. Under the statute 56 Geo. 3, c. lxv, the general freehold in the site of the church seems to have been in the commissioners and trustees: s. 4. By s. 11, all the pews in the first schedule are vested in the incumbent for his sole use. Whether or not that vested the freehold in him, it is not necessary to consider. Sect. 13 deals with the pews and seats in the third schedule, and makes them chargeable with certain rents and other assessments. By s. 15 the purchasers of pews or seats are to pay the rents and assessments, and in the event of non-payment power is given to the churchwardens to enter upon or let the same, or to sue for the rent, &c. By s. 17 the commissioners and trustees are authorized to let or sell and convey "for the purpose only of attending Divine service," the pews not otherwise appropriated; provided (s. 20) the purchaser is an inhabitant of the parishes of Liverpool or Walton. Under this Act, therefore, the pew-owner has a mere right to use the pew granted to him for the purpose of attending Divine worship. Then comes 2 & 3 Vict. c. 33, the 4th section of which, after reciting that doubts had arisen as to the estate and interest which the subscribers and proprietors took in the pews and seats in the third schedule of the former Act, enacts that "the fee-simple and inheritance of and in the said pews and seats set forth in the third schedule shall be vested in the said subscribers to the said church, or the proprietors for the time being of the same pews and seats, their heirs and assigns for ever," and they are impowered

(1) The respondents not appearing, *Crompton* produced affidavits stating that the notice required by 6 Vict. c. 18, s. 64, had been served upon Roberts and the other three persons named by the revising barrister as respondents; but, it appearing that only one of them was, in fact, overseer, notices had also been given to the other overseers. THE COURT held that the appellant was entitled to be heard.

(2) Law Rep. 2 C. P. 104.

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"to sell, dispose of, and convey all or any of the same seats or pews, together with the fee-simple and inheritance of the same respectively," to the purchaser. The effect of that section is, to convert the qualified easement which the proprietors of pews had under the former Act into an estate in fee-simple, which may be granted to persons other than inhabitants of the parish; but not to give them an interest in the soil.

[BOVILL, C.J. Like a conveyance of the fee-simple of a fishery, which would carry the freehold of the land if in the grantor, but otherwise would only pass the fishery.]

To hold that 2 & 3 Vict. c. 33 gave the proprietors of pews and seats a freehold of inheritance in the land would be sweeping away all the provisions of the former Act.

[WILLES, J. The real question is, whether s. 17 of 56 Geo. 3, c. lxv is not repealed by s. 4 of 2 & 3 Vict. c. 33, and whether that which the proprietors have a right to dispose of is, not merely the right of attending Divine service in the church, a mere easement in gross, but an interest in the soil, and to any man and his heirs, instead of in the usual way confining it to the inhabitants of the parish.]

The subscribers under the former Act were not to sell the pews, but the trustees; and that probably created the doubt recited as to the interest which the subscribers and proprietors took. There is no such estate known to the law as a freehold of inheritance in a pew in the body of a church: *Mainwaring* v. *Giles* (1); *Chapman* v. *Jones* (2); *Griffin* v. *Dighton* (3): and see the cases referred to in *Hinde* v. *Chorlton*. (4) A right such as this, which is a new creation of the Statute, clearly is not sufficient to confer a vote. It is not a tenement within 8 Hen. 6, c. 7. Then, assuming that the freehold of the soil was in the subscribers, the grant to Highfield and from Highfield to Redhead does not profess to convey more than "the sole and exclusive right of using the pews at all times when Divine service should be performed in the said church, and at all other reasonable times when the said church should be opened for the use of persons frequenting the same."

[WILLES, J. It is much to be lamented that the case does not

(1) 5 B. & A. 356.
(2) Law Rep. 4 Ex. 273.
(3) 5 B. & S. 93, 108; 33 L. J. (Q.B.) 181.
(4) Law Rep. 2 C. P. 104.

shew to whom the conveyance from the Mayor and Corporation of Liverpool was made, or whether the persons who conveyed to Highfield were the trustees and commissioners or the subscribers.]

In all probability the persons who conveyed were the trustees and commissioners: but the barrister had not the means of stating the facts more accurately.

The respondents did not appear.

Cur. adv. vult.

Feb. 23. The judgment of the Court (Bovill, C.J., Willes, J., and Brett, J.) was delivered by

BOVILL, C.J. In this case one Matthew Redhead claimed to be registered in the parish of Liverpool as a voter for the south-western division of the county of Lancaster, in respect of an alleged qualification thus described in his claim:—"Freehold pews, 72 and 72½ St. Mark's Church."

In support of his claim, Redhead produced a deed bearing date the 29th of April, 1863, made between one John Highfield and the said Matthew Redhead, whereby, after reciting that Highfield was seised to him and his heirs of the said pews, &c., *for an estate of inheritance in fee-simple*, it was witnessed that Highfield did thereby grant and convey unto Redhead and his heirs the said pews, and *the sole and exclusive right of using the same at all times when Divine service should be performed in the said church, and at all other reasonable times when the said church should be opened for the use of persons frequenting the same.*

It was admitted that Highfield derived his title from a deed in the same terms made shortly after the passing of the statute 2 & 3 Vict. c. 33 (private), between Highfield and the persons mentioned in s. 4 as "the said subscribers to the said church of St. Mark."

The church of St. Mark was established under the statute 56 Geo. 3, c. lxv. By s. 1 of that statute it was recited, among other things, that several of the inhabitants residing in the parish of Liverpool had *procured a lease* of land from the corporation of Liverpool, and had built a church or chapel thereon, with galleries, pews, seats, and other conveniences, accommodations, &c.; and that the *subscribers to and promoters of the said church or chapel, having purchased from the corporation the freehold reversion and*

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inheritance in fee-simple of the said church or chapel, had procured the said church or chapel to be consecrated, &c. The statute then enacted, by s. 4, that certain persons and their successors were appointed commissioners and trustees for the management of the temporal affairs, and for other purposes thereinafter mentioned; by s. 6 that two persons should be appointed annually to act as churchwardens, with power to collect seat and pew-rents, and, in case of non-payment of rents, to enter upon and sell, *or else to sue for and recover the rent by action;* by s. 11 the pews or seats in schedule 1 were for ever to become the sole and exclusive property of the incumbent, and the churchwardens were out of the yearly rent of the pews and seats in schedule 3 to pay the incumbent of the parish the yearly sum of 250*l*. By s. 13 it is enacted that all the pews and seats, save and except those in the first and second schedules (i.e. all the pews and seats in the third schedule) shall for ever be subject to the yearly rents set opposite them in the third schedule, to be paid by the possessors or occupiers to the churchwardens; and all such pews or seats shall also *be charged with such other rateable leys or assessments to be made as shall be necessary* for the purpose of repaying to the proprietors of the church the charges incurred in purchasing the reversion, &c. By s. 15 it is provided that every *purchaser*, &c., of a seat or pew, &c., shall *pay the rent* charged thereon as aforesaid, *and every such other rateable ley or assessment as aforesaid;* and, in default, the churchwardens shall and may enter upon and hold such seat or pew, or let the same, or sell the same by auction, or *the churchwardens may sue for and recover the said rent, ley, or assessment by action of debt or upon the case for the use and occupation of such pew or seat, to be brought against the owner*, &c. By s. 17 the commissioners and trustees and their successors are impowered to let or sell and transfer and convey, "*for the purpose only of attending Divine service*," all and every of the pews or seats which are not by the Act otherwise appropriated, &c. (1) But by s. 20 such sale

(1) Sect. 17. "That the said commissioners and trustees and their successors are hereby authorized and impowered to let or sell and transfer and convey for the purpose only of attending Divine service, all and every or any of the pews or seats in the said church or chapel (which are not by this Act or otherwise allotted or appropriated) now remaining unsold, to any person or persons whomsoever desirous of taking or purchasing the same, or who shall or

can be made only to such persons as are at the time inhabitants of one of the two parishes which are named. By s. 21 the seats in schedule 2 are free seats. Schedule 3 comprises all the pews in the church or chapel which are not in schedules 1 and 2. The pews in question are in schedule 3.

In the statute 2 & 3 Vict. c. 33 (private), s. 4 is as follows:—"Whereas, doubts have arisen as to the estate and interest which 'the subscribers to and proprietors of' the said church of St. Mark took in the pews and seats set forth in the third schedule of the recited Act; be it enacted that *the fee-simple and inheritance* of and in the said pews or seats set forth in the third schedule shall be vested in the said subscribers to the said church of St. Mark, or *the proprietors for the time being* of the same pews and seats, *their heirs and assigns*, for ever; and they are hereby authorized and impowered to sell, dispose of, and convey all or any of the said seats or pews, together with the fee-simple and inheritance of the same respectively, to any person or persons willing to become purchasers thereof."

Upon these facts and circumstances it was contended for the claimant that, by virtue of the Acts of Parliament, or one of them, and of the deeds, he was possessed of the freehold, not only of the pews, but of the land on which they stood; and, if not of the land, but only of the pews, yet that he was entitled to them as free tenements, as being profits arising out of the land, and therefore entitled to vote as being owner of a tenement within the statute 8 Hen. 6, c. 7. It was contended for the appellant, that neither by the Acts of Parliament nor by the common law could the grantors to Highfield grant to him more than an easement; and that, consequently, they did grant only an easement; and therefore he, Highfield, could only grant an easement to the claimant: and it was further contended that, if the original grantors could and did grant more than an easement to Highfield, still he had only by the terms of his deed granted an easement to the claimant.

may have already contracted or agreed for the purchase thereof, and to receive the rents and purchase-moneys for all such pews or seats respectively for the use and benefit of the original subscribers to and proprietors of the said church or chapel and their respective legal personal representatives, to be annually divided amongst them on Easter Tuesday."

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The case depends, no doubt, entirely upon the construction of the Acts of Parliament: and the questions which arise are, first, did the Act of Geo. 3 impower the original grantors to grant to Highfield an estate of freehold in the land on which the two pews stood, or a tenement in the pews in respect of which he might have voted by virtue of the 8 Hen. 6, c. 7? and, secondly, if it did not, did the 2 & 3 Vict. c. 33 give to the original grantors power to make grants of a freehold estate in the land, or of free tenements, within the statute of Hen. 6, in the pews, to Highfield?

Now, in the first place, it must be remembered that, unless the statutes do, or one of them does, expressly give the suggested rights, the ownership of a pew could not carry with it the freehold in the soil, nor more than an easement in the nature of an exclusive right to occupy the pew during Divine service and the times of other religious observances.

By the common law there is no property in, nor any right to sell or let, a pew or seat in the body of a parochial church or chapel. The freehold is generally in the parson; and the inhabitants have the right to use the church for Divine worship, though the right to use particular seats may have been acquired as appurtenant to particular messuages, by faculty or prescription, or for the time by the appropriation of the churchwardens or the ordinary. The right in a pew is essentially a right to use it for the services of the Church, and at times when it is open for use, subject to the regulations of the church; and there is no right of access to it or to use it for other purposes or in any other manner.

The word "pew" is said to be derived from the Dutch "puye," and to signify "a seat inclosed in a church." (Johnson's Dictionary.) And obvious inconvenience would arise if it were lightly held that each owner of a pew or seat was owner of so much of the site of a church as is comprised within the area of such pew or seat.

And, again, it is necessary, in order to determine this case in favour of the respondent, to distinguish it from the case of *Hinde* v. *Chorlton* (1), in which a similar claim to the present, made upon a statute, at all events primâ facie, not dissimilar from the statutes in this case, was disallowed. It lies strongly, we think, on those who rely upon the present Acts of Parliament to shew that they

(1) Law Rep. 2 C. P. 104.

clearly enact the unusual consequences sought to be derived from them. Now, on examining the first Act, we find, in the first place, that the freehold and fee-simple in the church or chapel are recited to be in the original subscribers and promoters of the church or chapel, who, after having taken the lease for lives of the site, are said to have purchased the reversion thereof in fee. Secondly, we find that there are no words in the statute assuming to pass any interest in land, but only in terms in pews or seats. Then, we find not only that the pews and seats are subject to payment of rent, but that the churchwardens may assess upon them leys or assessments; and *the churchwardens may sue for and recover the said rent, ley, or assessment, by action for use and occupation to be brought against the owner.* And, when the commissioners or trustees are impowered to sell and convey, *it is only for the purpose of attending Divine service.*

It seems to us that, upon a candid consideration of these enactments, it is impossible to say that the legislature has given to the owners of these pews and seats any freehold interest in the land which is covered by such pews and seats, or in any profit arising out of such land. There are none of the recognized terms for passing such interests; and the incidents imposed on the ownership of the pews and seats are inconsistent with the rights of ownership in the land. The interest which passes by the statute is in terms an interest in "a pew or seat," that is, an interest in the occupation of a pew or seat, "to be enjoyed during Divine service and other times of religious observances." Such an interest is not an interest in land, but an interest of a peculiar nature created by the Act of Parliament, and more in the nature of an easement, though there are attached to it incidents of perpetuity of possession which could only be attached to such a right by the power of legislation. The statute has created a special interest in the pews and seats not known to the common law, and such interest exists by force of the statute; but it is of a very peculiar nature, and does not in our opinion create such an estate or interest in the land as will confer a vote. In a similar manner, this Court recognized the creation of a new species of statutory property and interest in water, in the case of *Medway Navigation Co.* v. *Earl Romney.* (1)

(1) 9 C. B. (N. S.) 575, 591; 30 L. J. (C.P.) 236.

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Such being our view of the true interpretation of the statute of Geo. 3, we must next consider the effect of the statute 2 & 3 Vict. c. 33. That statute has, no doubt, very strong words referring to the extent of the interests of owners of some of the pews and seats, viz. those in the third schedule; but it does not seem to us to alter in any way the nature of the subject-matter in respect of which or in which that interest exists. The subject-matter is still a pew or seat, and not land or any free tenement such as was known to the common law, so as to be within the statute 8 Hen. 6, c. 7. The present case is, as it seems to us, governed by the case of *Hinde* v. *Chorlton* (1); for, in that case, although the freehold in the church was in the rector, the contention was that the freehold in the land on which the pews were placed, or a freehold in a free tenement, passed to the owners of pews by virtue of certain Acts of Parliament. In those statutes, the pews or seats were to be held by the proprietors, *their heirs, executors, administrators, successors, and assigns*, and the trustees were impowered to sell the pews or seats *and the fee-simple and inheritance thereof;* and by the sale and conveyance the pews or seats were to be vested in the purchasers and *their heirs and assigns, for ever:* yet the Court held that such purchasers were not entitled to be registered.

We think that the statutes in the present case in like manner have not the effect suggested by the respondents; and we are of opinion that, upon the true construction of the statutes, the decision of the revising barrister cannot be supported, and that it must be reversed.

Decision reversed. (2)

Attorneys for appellant: *Beale, Marigold, & Beale, for R. H. W. Biggs, Liverpool.*

(1) Law Rep. 2 C. P. 104.

(2) See the next case.

GREENWAY, APPELLANT; HOCKIN, RESPONDENT. 1870 Feb. 23.

Parliament—County Vote—Pew in a Church or Chapel—27 Geo. 3, c. 17.

By an Act of 27 Geo. 3, c. 17, certain trustees were impowered to take down and rebuild a chapel, and to appropriate the pews to persons who had subscribed to the building, and such persons were to be deemed proprietors, and the pews or seats were vested in them and their heirs for ever. It did not appear in whom was the freehold of the land upon which the chapel was built:—

Held, that the proprietors of pews had not such a freehold interest in any portion of the soil of the chapel, or in any profit arising thereout, as to entitle them to votes for the county.

APPEAL from the Revising Barrister for the southern division of the county of Devon.

The appellant duly objected to the following claim to vote in the election of members for the said division, in respect of property within the parish of East Stonehouse,—"Cox, George—Manor House, Emma Place, Stonehouse—Freehold pew: No. 74, St. George's Chapel, Stonehouse."

The pew was in St. George's Chapel, within the parish of East Stonehouse, which had been rebuilt under a public Act, 27 Geo. 3, c. 17, intituled "An Act for re-building the chapel of East Stonehouse, in the county of Devon."

By that Act,—after reciting that the chapel was a very ancient building, and was become much decayed, and was not sufficiently large for the inhabitants of the said chapelry to attend Divine service therein; and that the building of a new chapel within the chapelry sufficiently large for the inhabitants would be a great convenience to them,—it was by s. 1 enacted that certain persons therein named, and every person who should subscribe the sum of 50*l.* or upwards towards erecting a new chapel in pursuance of the Act, and also the lord of the manor of East Stonehouse for the time being, the mayor of Plymouth for the time being, the commandant of the marines in the barracks at East Stonehouse for the time being, and the curate and two chapel-wardens of the chapelry for the time being, should be and they were thereby appointed trustees for taking down the then chapel within the chapelry and erecting a new chapel instead thereof, and for carrying the Act into execution. And it was enacted by s. 4 that it should be

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lawful for the trustees, and they were thereby authorized and impowered to cause the then chapel of the chapelry to be taken down; and the materials thereof should be and were thereby vested in the said trustees, and they were thereby authorized and impowered to sell or otherwise dispose of the same for the purposes of the Act; and it should also be lawful for the trustees, and they were thereby authorized and impowered to cause a chapel to be erected upon the site of or near to the present chapel, and also to cause such pews or seats and galleries to be erected in the new chapel as the trustees should think proper or necessary.

And it was enacted by s. 9 that it should be lawful for the trustees and they were by the Act required to set out and appropriate a pew or seat in the new chapel unto the curate of the chapelry, and the same should for ever afterwards belong to the curate of the chapelry for the time being without his paying anything for the same, provided he or any of his family should reside within the chapelry; and that all other the pews or seats in the chapel should be respectively set out and appropriated by the trustees unto the several persons who should subscribe money towards building the chapel, and such persons should respectively be deemed proprietors of such number of the pews or seats as should be proportionable to the sums by them respectively subscribed; and such pews or seats should be vested in such proprietors respectively, their heirs and assigns for ever.

The pew in question was set out and appropriated by the trustees to a subscriber to the building of the chapel, and had been conveyed by such subscriber to the person who had conveyed to George Cox. It was admitted that the pew exceeded 40*s.* a year in value.

George Cox occupied the pew by himself and family.

No evidence was given to shew in whom the freehold of the soil was vested previously to the passing of the Act.

On behalf of the appellant, who quoted *Hinde* v. *Chorlton* (1), it was contended that the voter was not entitled to vote, the Act having only conferred an easement upon him.

On behalf of the respondent, it was contended that the Act conferred a freehold interest on subscribers to whom pews were appro-

(1) Law Rep. 2 C. P. 104.

priated by the trustees; that the present case was distinguishable from *Hinde* v. *Chorlton* (1), the vicar of the parish of St. Andrew not being made a trustee under the Act; that the money was subscribed for the purpose of building the church, and not paid for pews after the church had been built; and that the Act contained no restriction from parting with the pews to other than parishioners.

The revising barrister held that the claimant was entitled to have his name retained on the list of voters.

If the Court should be of opinion that the Act conferred such an interest as to entitle the holder of the pew to vote, the name was to remain on the list; otherwise it was to be erased.

Jan. 25. *Mellish, Q.C.* (*Charles* with him), for the appellant. There was no evidence given or procurable as to the person in whom the freehold of this chapel was vested before the passing of the Act. It being a parochial chapelry, the patronage of which is in the vicar of the parish, the presumption is that the freehold is in him; and there is nothing in the Act to vest it in any one else. Indeed s. 8 (which is not set out in the case) contains an express saving of his rights. (2) The materials of the old chapel are by s. 4 vested in the trustees; but there are no words to convey the freehold to them. The words at the end of s. 9, "and such pews or seats shall be vested in such proprietors respectively, their heirs and assigns, for ever," are far less strong than the words which in *Hinde* v. *Chorlton* (1) were held to be insufficient to vest in the proprietors of pews and seats a right to vote; and also far less strong than the words in the Statutes upon which the question in *Brumfitt* v. *Roberts* (3) turned. The utmost they could or were intended to give was a right in the proprietors of pews to occupy them for the purpose of attending Divine service in the

(1) Law Rep. 2 C. P. 104.

(2) S. 8. Provided always that "nothing in this Act contained shall any ways prejudice, lessen, or affect the rights of the vicar of the parish of St. Andrew, for the time being in or to the presentation, nomination, or appointment of the curate of the said chapelry, or any other right belonging to the said vicar;" "but that the vicar of the said parish, and the curate of the said chapelry for the time being, shall have and enjoy all such rights and interests as they would respectively have had, enjoyed, or been entitled to, in case this Act had not been made."

(3) Ante, p. 224.

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chapel. It is not a tenement within 8 Hen. 6, c. 7, nor even a profit à prendre; nor does it even amount to an easement. It is no more than the right acquired under a faculty to a pew in a church, which it never was pretended would confer a right to vote.

[WILLES, J., referred to *The Medway Navigation Co.* v. *Earl Romney.* (1)]

Lopes, Q.C. (*Bosanquet* with him), for the respondent. The 9th section of 27 Geo. 3, c. 17, gives the proprietor of a pew the exclusive right of enjoyment in him and his heirs for ever. That creates such an interest in the proprietor as will satisfy the word "tenement," and give a vote for the county. In Co. Litt. 6. a., it is said: "Tenementum, tenement, is a large word to pass not only lands and other inheritances which are holden, but also offices, rents, commons, profits apprender out of land, and the like, wherein a man hath any franktenement, and whereof he is seised ut de libero tenemento." Again, at p. 19. b., "Tenements, tenementa. This is the only word which the said statute of W. 2 (2), that created estates tail, useth; and it includeth not only all corporate inheritances which are or may be holden, but also all inheritances issuing out of any of those inheritances, or concerning, or annexed to, or exercisable within the same, though they lie not in tenure; therefore all these without question may be intailed. As, rents, estovers, commons or other profits whatsoever granted out of land, or uses, offices, dignities which concern lands or certain places, may be intailed within the said statute, because all these savour of the realtie." This is a profit arising out of land. The case is distinguishable from *Hinde* v. *Chorlton* (3) in many respects. There, the freehold of the old church remained in the vicar. Here, it is not stated in whom it is; but one of the trustees is the lord of the manor of East Stonehouse for the time being.

[BOVILL, C.J. This being an old parochial chapelry indowed with tithes, the presumption is that the freehold is in the incumbent. At all events, it is for the claimant to prove his title to vote.]

The presumption arising from the words of s. 9 of the Act would be that the freehold is in the proprietors of the pews.

(1) 9 C. B. (N. S.) 575; 30 L. J. (C.P.) 236. 7 Jur. N.S. 846

(2) De Donis, 13 Ed. 1, c. 1, Westm. 2, c. 1. (3) Law Rep. 2 C. P. 104.

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Mellish, Q.C., in reply. There is no authority for saying that an easement in gross, or even a profit à prendre in gross, has ever been considered a tenement within 8 Hen. 6, c. 7.

Cur. adv. vult.

Feb. 23. The judgment of the Court (Bovill, C.J., Willes, J., and Brett, J.) was delivered by

BOVILL, C.J. In this case, acting in accordance with the judgment we have given in the case of *Brumfitt* v. *Roberts* (1), and with the judgment in *Hinde* v. *Chorlton* (2), we are of opinion that the decision of the revising barrister must be reversed.

Decision reversed.

Attorneys for appellant: *Pattison, Wigg, & Co.*
Attorney for respondent: *W. Harris, for J. Kelly, Plymouth.*

BREWER, APPELLANT; M'GOWEN, TOWN-CLERK OF BRADFORD, RESPONDENT.

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Nov. 17.

Parliament—Borough Vote—Joint Occupation of Dwelling House—30 & 31 *Vict.* c. 102, s. 3—*Lodger.*

A person, otherwise qualified as an inhabitant occupier, as owner or tenant, of a dwelling house in a borough, under 30 & 31 Vict. c. 102, s. 3, does not become a joint occupier within the proviso, and so lose his qualification, by letting to a lodger the exclusive use of a bed-room and the joint use of a sitting-room.

APPEAL from the Revising Barrister for the borough of Bradford.

The appellant claimed to be inserted on the list of voters for the township of Horton.

The appellant was, on the last day of July, 1869, and during the whole of the preceding twelve calendar months had been, an inhabitant occupier as tenant of a dwelling house within the township of Horton, which dwelling house was not of the clear yearly value of 10*l.*; and he was during the time of such occupation rated as an ordinary occupier in respect of the premises to all rates made for the relief of the poor in respect of such premises, and had paid

(1) Ante, p. 224. (2) Law Rep. 2 C. P. 104.

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all rates up to the 5th of January, 1869. The appellant was the sole tenant of the house, and was alone liable for the payment of the rent and rates payable in respect thereof.

The appellant had during three months of the year preceding the last day of July, 1869, let a furnished bed-room in his house as a sleeping apartment to a lodger, who had also the joint use of another apartment as a sitting-room. The appellant provided board for his lodger, and received a fixed weekly sum for such lodging and board: but the lodger was not in any way responsible for the payment of the rent or rates; and his occupancy might at any time have been terminated on one week's notice given by either party.

The revising barrister decided that the appellant was a joint occupier of his dwelling house within the meaning of the proviso at the end of s. 3 of the Representation of the People Act, 1867 (30 & 31 Vict. c. 102); and on that ground he disallowed the claim. He was of opinion that the words of the proviso, "joint occupier of any dwelling house," did not either by express words or necessary intendment mean joint occupier of any dwelling house "as owner or tenant;" that the words "as owner or tenant" being omitted in the proviso, the words, "as joint occupier of any dwelling house" were comprehensive enough to include lodgers occupying a part of the house; that, by s. 4 of the same statute, lodgers are qualified to vote if occupying apartments of 10*l.* value unfurnished "separately and as sole tenants;" and that the interpretation clause, s. 61, defines "dwelling house" to be any part of a house occupied "as a separate dwelling." He thought that the claimant did not occupy any part of his house as a separate dwelling within this description.

On reference to s. 27 of the Reform Act (2 Wm. 4, c. 45), the 10*l.* occupation franchise is there defined to be by express words an occupation as "owner" or "tenant;" and, as the legislature had left out those words in the proviso to s. 3 of the Representation of the People Act, 1867, the revising barrister was of opinion that, if the intention was to exclude only joint occupiers of any dwelling house as "owners or tenants" in the same right under that section, apt words would have been introduced to express such intention; and that the words as they stood included lodgers as occupiers as

well as owners or tenants. Secondly, he was of opinion that the lodger was a "joint occupier" with the claimant of the dwelling house as tenant. He thought there was nothing in the section to import a tenancy under the same landlord, or in the same right, to be meant; that this was held not to be necessary under the old Reform Act,—*Rogers* v. *Harvey* (1); that a lodger is a tenant,—*Cook* v. *Humber* (2),—and so called in s. 4 of the Representation of the People Act, 1867; that it had been held, in the case last cited, to be immaterial under what denomination of tenant he is classed, whether as a lodger, a termor, or a lessee. He further thought, under the authority of *Cuthbertson* v. *Haines* (3), that the lodger was a joint occupier of the same dwelling house with the claimant, because the claimant was not separately rated for that part of the house which he occupied as a separate dwelling, so as to constitute that part of it a separate dwelling within the meaning of s. 61 of the Representation of the People Act, 1867.

The cases of two other claimants were consolidated with the principal case.

If the Court should be of opinion that the decision of the revising barrister was wrong in point of law, the names of the claimants were to be inserted in the list.

H. James, Q.C., for the appellant. The question is whether one who occupies as tenant a dwelling house in a borough, of less than the yearly value of 10*l.*, loses the qualification conferred upon him by s. 3 of the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), by letting lodgings. Subs. 2 of that section confers the franchise on one who is on the last day of July in any year, and has during the whole of the preceding twelve calendar months been, an inhabitant occupier, as owner or tenant, of any dwelling house within the borough. And then follows the proviso, that "no man shall under this section be entitled to be registered as a voter by reason of his being a joint occupier of any dwelling house." Reading subs. 2 with the proviso, it is impossible to hold that a lodger,—a mere inmate,—is a joint occupier with his landlord.

(1) 5 C. B. (N. S.) 3; 28 L. J. (C.P.) 17. 5 Jur. N.S. 199.

(2) 11 C. B. (N. S.) 33, 43; 31 L. J. (C.P.) 73. 8 Jur. N.S. 699

(3) Law Rep. 4 C. P. 525.

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The construction of the word "occupier" and the status and position of a lodger cannot be better put than by Lord Hardwicke in *Fludier* v. *Lombe* (1): "Why does their having let lodgings make these voters cease to be the sole occupiers within the meaning of the statute? And I must own I have no notion that they do thereby cease to be so; for, no man can be occupier of a house but either by living in one of his own or in one that he hires: and a lodger was never considered by any one as an occupier of a house. It is not the common understanding of the word; neither the house nor even any part of it can be properly said to be in the tenure or occupation of the lodger." The decision of the revising barrister is therefore clearly wrong.

G. Francis, for the respondent. To entitle a person to the franchise under s. 3, subs. 2, of the Representation of the People Act, 1867, he must be occupier of the entire house, or, as defined by the interpretation clause, s. 61, of "a part of a house occupied as a separate dwelling, and separately rated to the relief of the poor." Here, the appellant did not occupy any part of his house as a separate dwelling within that section. There was no structural separation, and no separate rating. There being no words in the proviso to shew that the joint occupation must be "as owner or tenant," any occupation jointly, of one room even, deprives the tenant of a vote. By s. 29 of the Reform Act, 2 Wm. 4, c. 45, it was provided that, where any premises were jointly occupied by more persons than one "as owners or tenants," each of such joint occupiers should be entitled to vote, provided the clear yearly value of the premises when divided sufficed to give the requisite qualification to each. If the legislature had intended the proviso in s. 3 of the recent Act to be confined to persons occupying "as owners or tenants," they would in like manner have used those controlling words. As they have not done so, the proviso must necessarily be construed more largely. This is not the case of a mere letting off one or more rooms; there is a distinct demise of a joint right of occupation, for a mere easement confers a right of occupation: and that distinguishes the present case from *Fludier* v. *Lombe*. (1)

H. James, Q.C., was not called upon to reply.

(1) Cas. temp. Hard. 307, 308.

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BOVILL, C.J. In the Representation of the People Act, 1867, a clear distinction is drawn between an occupier of a dwelling house generally and a lodger in a dwelling house. I think the appellant was the occupier as tenant of a dwelling house within s. 3, subs. 2. The only question is whether the lodger was a joint occupier with him within the meaning of the proviso. That proviso applies only to s. 3, and to the class of occupiers there referred to, viz. "inhabitant occupiers as owners or tenants." It appears from the statements in the case that the lodger had the sole use of a furnished bed-room, and also the joint use of another apartment as a sitting-room. That does not make him joint occupier with his landlord of the dwelling house, within the proviso. The decision of the revising barrister must be reversed.

WILLES, J. I am of the same opinion. The only safe way of construing the statute is to take the language which the legislature has used, and ascribe to it its plain natural meaning. I shall simply read the words of s. 3 which are applicable to the case, and see whether or not it falls within those words, and whether the words in their plain sense do not carry out the intention of the legislature consistently with the provision in the Act of 1832. To entitle a man to the franchise under s. 3, subs. 2, he must be "an inhabitant occupier, as owner or tenant, of a dwelling house." Now, a dwelling house is a human habitation, and the occupier of a dwelling house is one who has the general control of the outer door; and this case, therefore, falls within the language of subs. 2, unless the proviso prevents it. The proviso is, that "no man shall under this section be entitled to be registered as a voter by reason of his being a joint occupier of any dwelling house." Has that language the effect of excluding the inhabitant occupier from the franchise, simply because he happens to have a lodger who occupies one room of the house as a sleeping apartment and has the joint use of another to take his meals in? Clearly not, unless the absence of the words "as owner or tenant" necessarily leads to such a result. But I apprehend those words are not excluded from the proviso merely because they are not repeated in it. It would have been tautology to repeat them; for, the proviso is expressly confined to "this section," and the section is dealing only with a man

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who occupies as owner or tenant; it therefore by reference does express a joint occupation as owner or tenant. Was this lodger, then, such a joint occupier? He clearly was not a joint occupier of the room in which he took his meals. If authority were wanting for that, I would refer to Com. Dig. Trespass (B. 3). And with respect to the bed-room, he clearly had not an occupation as owner or tenant, but only an occupation as lodger. Turning to s. 4, we find the franchise given to every man who "as a lodger has occupied in the same borough separately and as sole tenant for the twelve months preceding the last day of July in any year, the same lodgings, such lodgings being part of one and the same dwelling house," and of a certain value, &c. The words "sole tenant" seem to be used there in contradistinction to "joint occupier" in s. 3. Lodgers are thus put upon a distinct footing from persons who occupy as tenants. Turning to the interpretation clause, s. 61, we find that "dwelling house" is to "include any part of a house occupied as a separate dwelling, and separately rated to the relief of the poor." It is enough to say that that would be satisfied by a part of a dwelling house with all internal communication cut off, and access thereto by means of a separate outer door. Without regard to value, that would be a dwelling house within the Act. It is unnecessary to refer particularly to s. 29 of the Reform Act, which provided for the case of a joint occupation, and gave a vote to each occupier if the value were sufficient to give 10*l.* to each. The construction we are putting upon s. 3, subs. 2, reconciles the former legislation with the present and the present with itself, and gives the ordinary construction to the words of the legislature, and clearly carries out what was meant.

KEATING, J. I am of the same opinion. The meaning of s. 3 of the Representation of the People Act, 1867, is plain when the previous state of the law is considered. Under the Reform Act, to give the occupation franchise a yearly value of 10*l.* was required. The present Act gets rid of the 10*l.* limitation as respects inhabitant occupiers of dwelling houses, the other requisites being fulfilled. Under the former law, not only did an occupation of the yearly value of 10*l.* give a vote, but by s. 29 joint occupiers also acquired a vote provided the premises sufficed to give a clear yearly value

of 10*l.* to each. When, therefore, s. 3 of the recent Act conferred a vote upon the occupier irrespective of value, it became expedient to exclude joint occupiers from claiming under that section: hence the necessity for the proviso that "no man shall under this section be entitled to be registered as a voter by reason of his being a joint occupier of any dwelling house." Here, the appellant appears for nine months of the year to have occupied a dwelling house so as to satisfy all the requirements of the law; but for the last three months he has let a room to a lodger. Under the old law, he would not thereby have ceased to be the occupier of the house, inasmuch as he retained a general control over the house and the access thereto. But it is said that, by conferring on the lodger a right to the joint use of another room to sit and take his meals in, the appellant ceased to be the sole occupier of the whole dwelling house, and is therefore deprived of the franchise. The proviso in question clearly was not intended to apply to such a state of things as that. It seems to me that we should be coming to a conclusion which is quite inconsistent with the plain words of the Act, if we held the appellant to be disqualified.

BRETT, J. I think the appellant is entitled to be registered, upon the proper construction of s. 3 of the Representation of the People Act, 1867, taken by itself. That section gives the right to vote to a particular class, limited by subs. 2 to those who are inhabitant occupiers, as owners or tenants, of dwelling houses within the borough. The proviso being limited in its application to this section, it was unnecessary to repeat the words "as owner or tenant." If that were not so, "occupier" would still bear the same meaning. The Act deals with two descriptions of occupiers, viz. in s. 3 with those who occupy as owners or tenants, and in s. 4 with those who occupy merely as lodgers. The reason for the introduction of the proviso is plain. Under s. 29 of the Reform Act, joint occupiers were entitled to be registered where the value of the premises was sufficient to give a clear yearly value of 10*l.* to each. When, therefore, the new statute conferred the franchise on occupiers of dwelling houses irrespective of value, it might have been contended that any number of joint occupiers would be entitled to be registered under it, which would have given votes to a

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great many persons upon whom it was never contemplated that the franchise should be conferred. The proviso was, therefore, introduced for the purpose of confining the right to those who were sole occupiers of dwelling houses in the borough. The view taken by the revising barrister was clearly wrong.

Decision reversed. (1)

Attorneys for appellant: *Johnson & Weatheralls, for Rawson, George, & Wade, Bradford.*

Attorney for respondent: *G. Cann, for W. T. M'Gowen, Bradford.*

Nov. 17.

SMITH, APPELLANT; LANCASTER, RESPONDENT.

Parliament—Borough Vote—Occupation as Tenant under 2 *Wm.* 4, *c.* 45, *s.* 27 *—Chambers in the Inns of Court—Sub-letting of Part.*

Ante 239 6 C.B. 361

The tenant of a set of chambers in the Temple, let to each of two sub-tenants a room unfurnished, of which the sub-tenant had the exclusive use, with the joint use of the vestibule, and a key of the outer door, the tenant himself retaining one room for his own exclusive use, and providing attendance, light, and firing for the whole set:—

Held, that the sub-letting did not deprive the tenant of his right to be registered as occupier of a house as tenant under 2 Wm. 4, c. 45, s. 27.

APPEAL from the Revising Barrister for the city of London.

The appellant was on the list of voters for the Inner Temple, in respect of his occupation of chambers at No. 1, King's Bench Walk, Temple.

The appellant held as tenant the entire set of chambers, so structurally severed from the rest of the building as to be of themselves a house, under a demise from the benchers of the Inner Temple, the owners thereof, at a yearly rent of 70*l.*

These chambers consisted of three distinct rooms not communicating together and a vestibule into which the rooms respectively opened. One of these rooms was occupied by the appellant and used by him in transacting the professional business of a barrister. The appellant demised each of the other two rooms to two persons

(1) See the next case.

respectively. Each of these persons held under an agreement in writing in the following form, mutatis mutandis :—

"1, King's Bench Walk, 15 Dec. 1868.

"Mr. G. J. P. Smith agrees to let and Mr. Lister agrees to take the north back room of these chambers from the 29th of October last, at the rent of 30*l.*, payable quarterly, on &c. in each year; the rent to include attendance of clerk, laundress, rates, taxes, and coals; the tenancy determinable at any time by either party giving one quarter's notice."

The two tenants entered under the above agreements into the occupation and possession of the several rooms, and used them in transacting the business of their profession of barristers. They had the services of the clerk and laundress who were engaged by the appellant, and were supplied with coals, according to the terms of the agreement.

There are no rates for the relief of the poor in the Inner Temple: but all other rates and taxes were paid by the appellant. No one resided in any part of the chambers. Both of the rooms so demised by the appellant were let unfurnished.

The appellant and each of his tenants had a key to the outer door. It was not the practice to lock the doors of the rooms; but it was admitted that the tenants had the right to do so at all times.

All other requisites for entitling the appellant to be retained on the list of voters in respect of the above qualification were duly proved.

The appellant claiming to be retained on the list in respect of his occupation as tenant of the entire set of chambers, it was objected that, having regard to the above facts, the appellant ought to be struck off the list, on the ground that, by virtue of the demises to his undertenants, the landlord (the appellant) had divested himself of all right of occupation of the parts demised, and thereby the tenants had acquired an independent occupation of the parts demised, to the exclusion of the appellant.

For the appellant it was argued that, notwitstanding the demises, he retained such an occupation of the entire set of chambers as to make him a tenant occupying a house within the meaning of 2 Wm. 4, c. 45.

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The revising barrister decided that the objection was good, holding that at law, in the absence of any express reservation to the appellant of some control over or occupation of the parts demised, the sub-tenants, under or by virtue of the aforesaid agreements, acquired an independent occupation, and to the exclusion of the appellant, of their holdings; and that it could not be inferred at law, having regard to the facts before stated, and more particularly to the fact that the appellant did not reside, that he retained any occupation of the parts so demised by him: and the barrister accordingly struck off or refused to insert on the register the names of the appellant and of sixty-seven other persons whose cases were consolidated with the principal case.

The question for the Court was, whether the occupation of the appellant of the chambers was sufficient to entitle him to have his name retained on the register.

Prentice, Q.C., for the appellant. This is an attempt to extend the decision of this Court in *Cuthbertson* v. *Butterworth* (1), where the sub-tenant was held not to be entitled to be registered, to the case of one who is constructively the occupier of the whole set of chambers. Under s. 27 of the Reform Act, residence is immaterial: the only question is, who is the occupier. An undertenant of a room is merely in the position of a lodger. Letting off a part of a house does not render the party letting less the occupier of the whole house: *Smith* v. *St. Michael's Cambridge* (2); per Tindal, C.J., in *Wansey* v. *Perkins, Hill's Case.* (3)

F. M. White, for the respondent. The appellant has no such exclusive occupation of a house as to entitle him to a vote under 2 Wm. 4, c. 45, s. 27. To bring him within that section, he must be the occupier of the whole set of chambers; whereas, the facts shew that he has occupation of his own room only. The cases on the subject are all reviewed in *Cook* v. *Humber* (4), where the conclusion arrived at by the Court is that "house" means the *whole* house. In *Smith* v. *St. Michael's Cambridge* (2), a person resided upon the premises who was employed by the tenant to take

(1) Law Rep. 4 C. P. 523.
(2) 3 E. & E. 383; 30 L. J. (M.C.) 74.
(3) 7 M. & G. 151, 155.
(4) 11 C. B. (N.S.) 33; 31 L. J. (C.P.) 73; K. & G. 413.

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care of them; the tenant, therefore, was properly held to be constructively in possession of the whole house. *Rex* v. *St. Nicholas Colchester* (1) is almost directly in point. It was there held that, if a person hiring a tenement underlet any part of it, he has not the actual occupation of the tenement within the terms of the statute 1 Wm. 4, c. 18, s. 1, if there be any exclusive occupation given by such underletting; and that the smallness of the part underlet, and of the rent paid for it, and the shortness of the term for which it is underlet, make no difference.

[BOVILL, C.J. The decision there turned upon the words of the statute, which required an actual and not a mere constructive occupation, as was held in *Rex* v. *St. Nicholas Rochester* (2), where Lord Denman, C.J., says: "The meaning of the word *occupied* may vary according to the occasion or the subject-matter. The meaning, therefore, which it has received in considering what occupation was necessary to constitute a mansion-house in which burglary might be committed, or to give a right of voting, or to make a party rateable to the relief of the poor, is no test of its meaning in this particular case. A new distinction is introduced by the statute 1 Wm. 4, c. 18. Under the former statute, 6 Geo. 4, c. 57, a constructive occupation was sufficient. This statute requires an occupation in fact."]

The words of the sub-demise which is set out in the case shew that the appellant retains only the exclusive occupation of his own room; and the case finds that he has divested himself of the control over the outer door, each of his tenants having a key of it. In *Score* v. *Huggett* (3), the occupier of part of a house who had a key of the outer door, the landlord not residing in or occupying any portion of the premises, was held to be entitled to vote.

Prentice, Q.C., was not called upon to reply.

BOVILL, C.J. It is clear that the set of chambers rented by the appellant was a house within s. 27 of the Act of 1832, and that he, having hired it, would be the occupier of a house. The only question is whether he ceases to be the occupier by reason of his having let off two rooms to undertenants. That the undertenants are

(1) 2 Ad. & E. 599. (2) 5 B. & Ad. 219, 226.
(3) 7 M. & G. 95; 1 Lut. 198.

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not to be considered as occupiers of a house or houses has already been determined in *Cuthbertson* v. *Butterworth*. (1) What is the general understanding with reference to matters of this kind? In *Fludier* v. *Lombe* (2) it was held that the letting part of a house to a lodger did not prevent the tenant from being the occupier of a house for the purpose of acquiring a right to vote in the election of a common-councilman. And *Smith* v. *St. Michael's Cambridge* (3) shews that the appellant in this case would be occupier of the whole house for the purpose of rating, if these chambers were rateable. And it seems to me that he is equally the occupier of the whole, within s. 27 of the Reform Act, for the purpose of the franchise. The facts here shew that, though the undertenants have the exclusive occupation of their several rooms, and the joint use of some other conveniences, they are not occupiers of a house, but rather fill the character of lodgers. The letting out a part has never yet been held to deprive the tenant of the general control and management of the subject of occupation. There is no pretence for saying that there is any joint occupation here. And we have already decided in *Brewer* v. *M'Gowen* (4) that the mere fact of letting a room for a sleeping apartment and the use of another for the lodger to take his meals in, does not change the character of the occupation. *Rex* v. *St. Nicholas Colchester* (5) has been cited, which shews the occupation required for a pauper's settlement. That case was decided upon the authority of a prior case of *Rex* v. *St. Nicholas Rochester* (6); and, when examined, it will be found to be based upon the peculiar language of the statute, which was passed for the very purpose of requiring *actual* occupation. The case of *Rex* v. *St. Nicholas Colchester* (5), therefore, is no authority for the respondent here. Consistently with all the decisions, and acting upon the principle which governed the Court of Queen's Bench in *Smith* v. *St. Michael's Cambridge* (3), I think we are bound to hold that the appellant was entitled to be registered, and that the decision of the revising barrister must be reversed.

(1) Law Rep. 4 C. P. 523.
(2) Cas. temp. Hard. 308.
(3) 3 E. & E. 383; 30 L. J. (M.C.) 74.
(4) Ante, p. 239.
(5) 2 Ad. & E. 599.
(6) 5 B. & Ad. 219.

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WILLES, J. I am of the same opinion. If it were necessary, special reasons might be found for saying that the sub-letting of one room of a set of chambers in the Inns of Court does not deprive the tenant of the whole set of the franchise. The demise in such a case is not like an ordinary demise to a tenant, who may use the place for any purpose he may think proper. It is limited to the individual, and to an occupation such as is usual in an Inn of Court. The position of the occupant very much resembles an occupation by a man as a licensee or as a guest in an inn, or, at the highest, that sort of qualified right which was held by Hill, J., in *Smith* v. *St. Michael's Cambridge* (1), not to interfere with the grantor's occupation as tenant of the whole house. But, although I think that enough to dispose of the case, I do not think it necessary to dwell upon these circumstances, because I am clearly of opinion that the letting a part of a house does not prevent the occupier of the rest from acquiring a vote, provided he retains the mastership and general control over the house, including the control over the outer door. Suppose a man were to hire a dwelling house, with the exception of the wine-cellar, agreeing to allow the lessor to have access to the cellar whenever he wanted to get his wine: could it be said that the tenant, all other requisites being complied with, would lose the right of voting by reason of the exception? I think it would be impossible to come to any such conclusion. I am quite satisfied with the rule laid down upon this subject by Maule, J., in *Toms* v. *Luckett* (2): "Where the owner of a house takes in a person to reside in a part of it, though such person has the exclusive possession of the rooms appropriated to him, and the uncontrolled right of ingress and egress, yet, if the owner retains his character of master of the house, the individual so occupying part of it occupies it as a lodger only, and not as a tenant within the meaning of the 27th section. The fact of the party having or not having a key of the outer door is not decisive of the question. If he has a key, I cannot conceive that the circumstance of other persons enjoying the same privilege, can make any difference,—he having only a right of way, which would be in no degree affected by his having it in common with others. But the question de-

(1) 3 E. & E. at p. 390; 30 L. J. (M.C.) at p. 77.
(2) 5 C. B. 23, 38; 2 Lut. 19.

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pends upon whether or not the owner of the house resides upon the premises, retaining his quality of master, and reserving to himself the general control and dominion over the whole. If he does, the inmate is a mere lodger." Here, the appellant did, in the language of Maule, J., retain the general control and dominion over the whole. I need hardly say that I agree with the decision in *Cuthbertson* v. *Butterworth* (1), where undertenants holding under terms similar to these were held to acquire no votes. I cannot share in the doubt entertained by the revising barrister.

KEATING, J. I am of the same opinion. The appellant was tenant to the Inn of the whole set of chambers. Occupying the chambers, and complying with all the other requisites, he obtained the franchise, and has not lost it by letting part.

BRETT, J. The only objection to the appellant's being registered was that he had agreed by a binding contract to let the exclusive use of two of the rooms which he rented of the Inn to undertenants, with the usual means of access. That clearly does not prevent him from being entitled to be registered as the occupier of a house under s. 27.

Decision reversed.

Attorneys for appellant: *Harper, Broad, & Manby.*
Attorneys for respondent: *Travers, Smith, & De Gex.*

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Jan. 21.

PIERCY, APPELLANT; MACLEAN, RESPONDENT.

Parliament—Borough Vote—"Counting-house" within s. 27 of 2 Wm. 4, c. 45—Part of a House.

To entitle the occupier to a borough vote in respect of a "counting-house," under s. 27 of 2 Wm. 4, c. 45, it need not consist of an entire building, or be structurally severed from the rest of the house of which it forms a part.

APPEAL from the Revising Barrister for the city of London.

The respondent claimed to be inserted in the list of voters for the parish of St. Katherine Cree Church, in respect of a counting-house situate at and within a house numbered 10 Billiter Street.

The counting-house consisted of two rooms forming, together

(1) Law Rep. 4 C. P. 523.

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with the landing of the staircase, the first floor of the house. The house was originally built for a dwelling house, and in former years had been so occupied. But, in common with many similar houses in the city, the use of it as a dwelling house had been abandoned, and the whole of it was let out in separate apartments for business or commercial purposes, and at no time since the 30th of July, 1868, had the same or any part thereof been used as a dwelling.

The landlord, who has a lease of the entire house, underlets the ground floor to a person who occupies it as a grocer's shop. The rest of the house is let out in separate holdings to tenants who occupy them as counting-houses or business offices.

No structural alteration has been made in any part of the house since it was disused as a dwelling house.

The first floor is let to the claimant as tenant from year to year at a yearly rent of 65*l.*, under an agreement that the landlord should thereout pay all the rates on behalf of the claimant in respect of the premises occupied by him, the rent being higher than it would have been if the claimant were personally to pay the rates to the collector. This floor consists of two rooms communicating together by an internal door, each of which rooms has a separate outer door to the landing of the staircase which gives access to this floor and the floors above. These doors are the same doors as were attached to the rooms when the house was used as a residence. On the outside of one of these outer doors is painted the name of the claimant. These rooms were occupied and used by him as a counting-house, in his trade or business of a wine-merchant. He alone, and to the exclusion of the landlord, had the keys of the doors that opened on to the landing.

These rooms were used in manner aforesaid by the claimant and his clerk during the day-time; and after the business hours the doors on the landing were locked and the keys taken away by him or his clerk.

There is an outer door to the house opening on the street, which lies open during the day; but after business hours this door is closed and secured by a latch-lock, of which the claimant has a key.

The claimant was rated to all the rates, in manner following:—

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Against "No. 10 Billiter Street" in the rate-book, the overseers had placed the claimant's name in the occupiers' column, followed by the words "Counting-house," immediately below the name of the landlord, which was followed by the word "house." The two names were bracketed together, and the rateable value, which exceeded 120*l.*, and the rate in the pound, and the rating of the whole house, including therein the counting-house, were carried out in the appropriate columns of the rate-book against these names jointly; but no separate value or rating of the counting-house alone was inserted in the rate-book. There had been no special enactments as to rating in force in the parish.

Both the rates and the rent had been duly paid, and all other requisites, not herein specifically mentioned to entitle the claimant to be placed on the list of voters in respect of his occupation of the counting-house, were duly proved.

The claim was objected to on the following grounds:—1. That the tenement in the claimant's occupation was not sufficient in kind to confer a qualification, by reason of there being no such structural severance of the rooms occupied by him as a counting-house from the rest of the house as to constitute them a "counting-house," within the meaning of the Reform Act, 2 Wm. 4, c. 45, s. 27. 2. That the claimant was not, as such occupier, an occupier of premises in respect of which he was legally liable to be rated, on the alleged ground that an occupier of part of a house not structurally severed from the rest of the house is not liable to be rated, and therefore that the placing of his name by the overseers on the rate-book in manner aforesaid was no rating of him in respect of the premises he occupied.

The revising barrister disallowed the objections, and inserted the claimant's name on the list,—holding, 1. that there was such a conversion, user, and occupation of the two rooms into and as a counting-house as to make them a "counting-house" within the meaning of the Reform Act, and that no further structural severance than appears on the facts was necessary to make them a good qualification as a "counting-house;" 2. that, the overseers having placed the name of the claimant on the rate-book in manner aforesaid, they had thereby so rated him in respect of the premises he occupied as to entitle him to be placed on the list of voters as

duly rated; 3. that the claimant was legally rateable as an occupier in respect of the premises he so occupied, and that such joint rating of him and his landlord in respect of the whole house rated him in respect of the premises he exclusively occupied, being part thereof.

The cases of 470 other persons who were inserted or claimed to be inserted in the lists of voters for this and other parishes in the city, were consolidated with the principal case.

The question was whether or not it was rightly decided that the said voters were entitled to have their names retained or inserted, as the case might be, in the register of voters.

Prentice, Q.C., for the appellant. The question is whether the occupier of a counting-house which is not structurally severed from the rest of the house of which it forms a part, is entitled to be registered. That depends upon the meaning of the words "counting-house" in 2 Wm. 4, c. 45, s. 27, which confers a vote upon the occupier as owner or tenant of "any house, warehouse, counting-house, shop, or other building." "House," primâ facie means a whole house. In *Toms* v. *Luckett* (1), the occupier of apartments in a house, having exclusive occupation, and a key of the outer door, the landlord occupying a portion of the premises but not residing there, was held entitled to be registered as tenant of a "building." But that may be considered to have been overruled by *Cook* v. *Humber* (2), where it was held that the occupation of part of a house, not structurally severed from the rest, confers no vote. Referring to *Toms* v. *Luckett* (1), Erle, C.J., delivering the judgment of the Court, says (3): "Toms was tenant and occupier of the first floor in the house. The landlord occupied the shop and parlour, but did not sleep there. The house was let out in lodgings, and each lodger had a key to the outer door. The revising barrister referred the question whether the *occupation* of Toms was sufficient to qualify, as the landlord did not sleep on the premises, and as Toms had no exclusive control over the outer door. The judgment is, that the occupation was sufficient, the exclusive control of the outer door not being essential, and the

(1) 5 C. B. 23; 2 Lut. 19.

(2) 11 C. B. (N. S.) 33; 31 L. J. (C.P.) 73; K. & G. 413.

(3) 11 C. B. (N. S.) at p. 43; 31 L. J. (C.P.) at p. 76.

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occupation of part by the landlord in the day not having the effect to disqualify which his sleeping there might have had. Three of the judges add that a part of a house is a sufficient tenement, being comprised under the words in the statute 'other building;' as to which, by referring to the question of the revising barrister, it seems that the point was not before the Court: and it should be noted that Mr. Justice Williams doubted the correctness of the judgment of his brethren on both points, but did not formally dissent from their judgment." If, then, "house" must be construed to mean a whole house, and "other building" is to receive the same construction, it would seem to follow that a "counting-house" must in like manner, in order to confer the franchise, be a distinct building or a portion of a building structurally severed from the rest. So, in *Powell* v. *Boraston* (1), to satisfy the words "other building," it was held that the erection must be of a substantial character, and ejusdem generis with those before enumerated. *Downing* v. *Luckett* (2) will probably be relied on as decisive of this case. But the only point raised there was whether the *occupation* was sufficient; and the Court held that it was. In *Wilson* v. *Roberts* (3), the occupation of "offices," without any actual severance from the residue of the premises was held not to confer a right to vote under this section. If a single room let for an office gives no vote, why should a similar room, without structural severance, occupied as a counting-house give one? So, as to chambers: *Cuthbertson* v. *Butterworth.* (4)

[BOVILL, C.J. The subject of occupation here is what in ordinary understanding is a counting-house,—a room or set of rooms appropriated by merchants, traders, and manufacturers to the business of keeping their books, accounts, letters, and papers—and it would be so described in a conveyance.]

As to the sufficiency of the rating, the case seems to be disposed of by *Wright* v. *Town Clerk of Stockport.* (5)

F. M. White, for the respondent. The subject of occupation here falls precisely within the description in s. 27 of the Reform

(1) 18 C. B. (N. S.) 175; 34 L. J. (C.P.) 78; K. & G. 430.
(2) 5 C. B. 40; 2 Lut. 33.
(3) 11 C. B. (N. S.) 50; 31 L. J. (C.P.) 73; H. & P. 179.
(4) Law Rep. 4 C. P. 523.
(5) 5 M. & G. 33; 1 Lut. 32.

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Act; and the facts stated by the revising barrister moreover shew such a structural severance of the respondent's rooms from the rest of the house as to remove the possibility of objection. The word "counting-house" has a universally recognized meaning; and, dealing with a popular subject, the legislature may fairly be assumed to have used it in its popular sense,—as is suggested by Byles, J., in *Stamper* v. *Overseers of Sunderland.* (1) A very large portion of the constituency of London would be disfranchised were a different meaning given to it. The impression of the Court upon this subject in *Cook* v. *Humber* is clear from what Erle, C.J., says (2): "As to the kind of tenement which qualifies, the statute has described two classes of buildings, viz. those used for residential and those used for commercial purposes,—house, for residence; warehouse, counting-house, shop, or other analagous building, for commerce. When the claim is in respect of a house, we consider that the legislature did not intend to create a part of a house used for residence, *and not for commerce,* a tenement sufficient to qualify." And in the judgment in *Wilson* v. *Roberts* (3) the same learned judge says: "We consider that the qualification fails, because the tenement the subject of occupation was not sufficient. It is not stated to be a shop, warehouse, or counting-house. It was not a house, because it was only a part of a house. It was not a building of a nature analagous to the others described in the statute, because it was only one part of a building, without any actual severance from the other parts." That seems to assume that the occupation of a warehouse, a counting-house, or a shop, will confer the franchise, even though they be parts of a house, without actual structural severance. Here, there was at least as complete a severance of the rooms occupied by the respondent as there was in *Henrette* v. *Booth.* (4) [He was then stopped by the Court.]

BOVILL, C.J. As far as we are informed, ever since the passing of the Reform Act, in 1832, the occupier of a counting-house such as is here described has been considered to be entitled to a vote. Notwithstanding that has been the almost universal opinion of the

(1) Law Rep. 3 C. P. 388.
(2) 11 C. B. (N. S.) at p. 45; 31 L. J. (C.P.) at p. 76. S Jur N S 700
(3) 11 C. B. (N. S.) at p. 54; 31 L. J. (C. P.) at p. 80. S Jur N S 720
(4) 15 C. B. (N. S.) 500; 33 L. J. (C.P.) 61; H. & P. 23. S Jur N S 1293

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meaning of "counting-house" in this statute, if Mr. Prentice could have satisfied us that it was an erroneous impression, it would have been our duty to yield to his argument. But I think he has failed to shew any reason for departing from the generally received notion. The decisions in this Court as to the meaning of "house" have varied. But, from the earliest case on the subject down to *Cook* v. *Humber* (1), I am not aware of one in which it has been suggested that a "counting-house" must be a whole house. It was formerly contended that a part of a house might be comprised in the words "other building," and that that must be so because those words followed "warehouse, counting-house, shop." But the construction which the Court has since placed upon the words is, that a part of a house is not a building within the section: and for this plain reason, that, if "house" means a whole house, it is impossible to put a more extended meaning upon "other building." The present case turns upon the meaning to be attached to "counting-house." Now, in the first place, a counting-house, according to the common understanding of mankind, is a part of a house devoted to purposes of commerce: so, in like manner, is a warehouse or shop. The particular rooms in question are found by the revising barrister to be used as a counting-house: and it lies on the appellant to satisfy us that the legislature contemplated in this Act something different from the common and ordinarily understood meaning of the word. There seems to be no direct decision as to the meaning of "warehouse," "counting-house," or "shop." But in several of the cases which have been cited various judges have expressed their views as to the meaning of those words. In *Toms* v. *Luckett* (2), which was decided in the year 1847, Wilde, C.J., says (3): "We all well know that the terms 'warehouse, counting-house, shop,' import parts of houses devoted to particular purposes of business; and the general words that follow 'or other building,' must have been intended to embrace other separate occupations of distinct portions of a house." The decision was that a part of a house simpliciter was a "building" within the Reform Act. That decision was overruled by *Cook* v. *Humber* (1); but the Court rather seem to adopt the other part of the judgment.

(1) 11 C. B. (N. S.) 33; 31 L. J. (C.P.) 73.

(2) 5 C. B. 23; 2 Lut. 19.

(3) 5 C. B. at p. 35.

The Chief Justice goes on (1): "The object of the legislature in introducing these words seems to have been, to prevent the discussions that might be expected to arise out of the previous words. I cannot help thinking that the apartments which this party is described as occupying should be held to fall within the words 'other building,' just as much as the words 'warehouse, counting-house, or shop,' are satisfied by the occupation of distinct portions of a house for the purposes before adverted to." There can be no doubt, therefore, that, in the opinion of that learned judge, "counting-house" was to be understood in its common acceptation as part of a house. In *Wright* v. *Town Clerk of Stockport* (2), where the question was whether a room in a factory, of which the tenant had the exclusive occupation, constituted a "building" within 2 Wm. 4, c. 45, s. 27, so as to entitle the occupier to a vote, Tindal, C.J., says (3): "We are of opinion that each of these rooms held in the manner described in the case, was such a building as to confer the right of voting upon its occupier. It is called in the case 'a room;' it is described as a distinct or separate portion of the factory; each tenant is stated to have the exclusive use of his own room, and the key to the door thereof. And we think such a description and such a mode of occupation brings it as much within the meaning of the word 'building' as is a shop or counting-house, which are expressly specified in the Act." The language of that very learned judge shews that in his opinion "shop" and "counting-house" meant portions of a house or building. And, when *Cook* v. *Humber* (4) came before the Court, where the question was whether the occupation of "part of a house," without any actual severance from the rest, conferred a right to vote, the Court, in deciding that question in the negative, did not in any degree dissent from the views expressed by Tindal, C.J., and Wilde, C.J., as to the meaning of the other words. In the course of his very elaborate judgment in that case Erle, C.J., says (5): "As to the kind of tenement which qualifies, the statute has described two classes of buildings, viz. those used for residential and those

(1) 5 C. B. at p. 35.
(2) 5 M. & G. 33; 1 Lut. 32.
(3) 5 M. & G. at p. 50.
(4) 11 C. B. (N. S.) 33; 31 L. J. (C.P.) 73; K. & G. 413.
(5) 11 C. B. (N. S.) at p. 45; 31 L. J. (C.P.) at p. 76.

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used for commercial purposes,—house, for residence; warehouse, counting-house, shop, or other analagous building, for commerce. When the claim is in respect of a house, we consider that the legislature did not intend to create a part of a house used for residence, and not for commerce, a tenement sufficient to qualify." If the Court had intended to say that a "counting-house," to confer the franchise, must be an entire and separate building, I should have expected to find some clear and definite statement to that effect. But it is quite manifest that no such notion was entertained by the Court. The case of *Wright* v. *Town Clerk of Stockport* (1) is referred to in the judgment without any expression of disapprobation. I therefore think we are justified in assuming that the construction of "warehouse, counting-house, and shop" in the earlier cases was not dissented from. The next case in which any reference is made to the subject is *Wilson* v. *Roberts* (2), where Erle, C.J., says: "In this case the claimant occupied the first floor, being a part of a house, which part had not become by actual severance an entire house in any sense of the word: and we consider that the qualification fails, because the tenement, the subject of occupation, was not sufficient. It is not stated to be a shop, warehouse, or counting-house. It was not a house, because it was only a part of a house. It was not a building of a nature analogous to the others described in the statute, because it was only one part of a building, without any actual severance from the other parts." That seems to shew that, in the judgment of the Court, if the subject of occupation had been used as a warehouse, counting-house, or shop, the appellant would have been entitled to be registered. For these reasons, I of am opinion that the decision of the revising barrister was correct. As to the rating, *Wright* v. *Town Clerk of Stockport* (1) is not to be distinguished in any respect from the present case.

WILLES, J. I am of the same opinion. The description of "counting-house," in the absence of anything in the subject-matter or in the context to restrain it to any particular sort of counting-house, must be held to include anything that is a counting-house

(1) 5 M. & G. 33; 1 Lut. 32.
(2) 11 C. B. (N. S.) 50, 54; 31 L. J. (C.P.) 78, 80; K. & G. 430.

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in the largest ordinary sense. That is the rule which has been constantly acted upon by this Court in construing the statutes which relate to the franchise. There can be no doubt that, in ordinary understanding, a counting-house is a part of a house which is devoted to the purposes of commercial business. It never has been suggested that it must be an entire house: and there is nothing in the context to warrant such a suggestion. I will assume that *Cook* v. *Humber* (1) rightly decided, notwithstanding the case of *Toms* v. *Luckett* (2), that "house" in 2 Wm. 4, c. 45, s. 27, means a whole house. All that it decides is that "house" is to be read in that sense: it leaves untouched the question what interpretation is to be put upon the words "warehouse, counting-house, or shop." If there be any ambiguity in the expressions, the rule of construction with which I started, viz. to take words which confer the franchise in their largest ordinary sense, must govern. It may be that a man may be the occupier of what in the popular sense may be called a counting-house, and yet acquire no vote: his occupation may give him no more right or control over the outer door of the house than an ordinary lodger, as pointed out by Lord Hardwicke in *Fludier* v. *Lombe.* (3) But here, there is no pretence for saying that the respondent's occupation was that of a mere lodger. He is more like the occupier of a set of chambers in the Temple; the only difference being, that, in the one case he can obtain access to his rooms without a key of the outer door, in the other not. The outer door is closed in ordinary houses to keep out improper characters. No such protection is needed in the Inns of Court, which are sufficiently protected by their gates.

BRETT, J. *Cook* v. *Humber* (1) has been relied on for the purpose of shewing that a counting-house which forms part of a house, without being structurally severed from the rest of it, does not constitute such a subject of occupation as will confer a vote under 2 Wm. 4, c. 45, s. 27. All that case decides is that the occupation of part of a house not structurally severed from the rest confers no vote, because "house" in that section means a whole house. Chambers in the Inns of Court, or flats, are in one sense only parts

(1) 11 C. B. (N.S.) 33; 31 L. J. (C.P.) 73; K. & G. 413.

(2) 5 C. B. 23; 2 Lut. 19.

(3) Cas. temp. Hard. 308

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of a house: but, being structurally severed from the rest, the occupiers have a vote. *Cook* v. *Humber* (1) has been supposed to have overruled *Toms* v. *Luckett* (2); but it does so only so far as that the Court rather approve of what was thrown out by Williams, J., than of the opinion pronounced by the other judges. The latter case, so far as it goes, stands as an authority to shew that a warehouse, shop, or counting-house may be part of a house, that is, that those words are to be construed according to their ordinary and popular meaning. One knows from one's own experience that there may be an occupation of a warehouse which would not confer a vote; for instance, where part of a warehouse is let off to a particular merchant to keep his goods in. If he were to claim to be registered in respect of that occupation, he would be met by the answer that he was tenant of only a part of a warehouse. Applying the ordinary rule of interpretation to the words of s. 27, I am clearly of opinion that the respondent was entitled to be registered. The decision of the revising barrister must therefore be affirmed; and, as our judgment is in affirmance of the franchise, it must be with costs.

Decision affirmed.

Attorneys for appellant: *Harper, Broad, & Manby.*
Attorneys for respondent: *Travers, Smith, & De Gex.*

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Nov. 29.

DURANT, APPELLANT; KENNETT, RESPONDENT.

Parliament—Borough Vote—Occupation as Owner or Tenant under 30 & 31 *Vict. c.* 102, *s.* 3—*Member of a Corporation Aggregate—Naval Knights of Windsor.*

The naval knights of Windsor were incorporated by Royal charter. According to the rules of the foundation, which was of a collegiate character, the members dined together in a common hall, each knight was on his election placed in the occupation of a dwelling house forming part of the collegiate buildings which were conveyed to the corporation; he held the house, by virtue of his appointment, for life, subject to expulsion in the event of his marrying or being guilty of certain offences or breaches of discipline; and had to keep it in repair:—

(1) 11 C. B. (N.S.) 33; 31 L. J. (C.P.) 73; K. & G. 413.
(2) 5 C. B. 23; 2 Lut. 19.

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Held, that the occupation of each knight was as a member of the corporation merely, and subject to regulations which were inconsistent with ownership in the individual, and therefore did not confer a right to a borough vote, as an inhabitant occupier, as owner, or tenant.

APPEAL from the Revising Barrister for the borough of New Windsor.

The appellant objected to the name of the respondent being retained on the householders list of voters for the parish of New Windsor.

The description of the respondent on the list was as follows:—"Kennett, Edward—Travers's College—House—Travers's College."

The respondent occupied during the qualifying period one of seven houses known as Travers's College, each of which was numbered and separately rated to the poor-rate, and he had paid all poor-rates which had become payable by him in respect of the premises.

The respondent was one of the seven naval knights of Windsor, who were incorporated by Royal charter dated the 23rd of June, 38 Geo. 3 (1798), by the name of The Poor Knights of Windsor, of the Foundation of Samuel Travers, Esq.

By 24 & 25 Vict. c. 116, s. 4, it was enacted that "the said poor knights shall henceforth be styled Naval Knights."

By the charter,—after reciting that Samuel Travers, Esq., deceased, by his will, dated the 16th of July, 1724, devised all his real and personal estate unto his executors and their heirs, upon trust out of the rents and profits to settle an annuity or yearly sum of 60*l.* to be paid to each and every one of seven gentlemen to be added to the then eighteen poor knights of Windsor; the said annuities to be charged upon an estate of 500*l.* per annum, to be purchased and set apart for that purpose, in the county of Essex; and that the testator humbly prayed that the said seven gentlemen might be incorporated by charter, with a clause enabling them to purchase and hold lands in mortmain; and that a building, the charges whereof to be defrayed out of his personal estate, might be erected or purchased in or near the castle of Windsor for a habitation for the said seven gentlemen, who were to be superannuated or disabled lieutenants of English men-of-

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war; but the repairs to be in the first place paid out of the said estate of 500*l.* per annum, and then 12*l.* per annum to be applied to the governor or senior of the seven, and the remainder to be equally divided between him and the other six; and that the testator desired that the seven gentlemen so to be incorporated might be single men without children, inclined to lead a virtuous, studious, and devout life, to be removed if they should give occasion for scandal; and that the testator declared his mind to be that they should live in a collegiate manner, in order whereunto he would have 26*l.* a year deducted out of their several allowances to keep a common table; and that the testator appointed the Chief Governor of Windsor Castle, the Dean of Windsor, and the Provost of Eton College, to be visitors, with power for them or any two of them to act; and that, as often as any vacancy should happen, the testator desired they might be thus supplied, viz. the Commissioners of the Royal Navy to choose three lieutenants for each vacancy, out of which the Lord High Admiral or the Commissioners of the Admiralty for the time being to choose two, and the King's Majesty to nominate one of them; and that, by an order of the Court of Chancery bearing date the 26th of July, 1793, in a cause pending in the said Court, proposals for setting apart a part of the testator's estates in the county of Essex for the purpose of a provision for the support and maintenance of the said seven gentlemen to be added to the eighteen Poor Knights of Windsor, instead of purchasing an estate for that purpose, and also the purchasing a piece of ground at Windsor whereon to erect a habitation for the said seven gentlemen, and the erecting such new buildings thereon, would be a proper execution of the trusts and directions in the testator's will respecting the same,—the seven persons therein named and their successors, to be elected and nominated in the manner prescribed in and by the will of the said Samuel Travers, were constituted one body corporate and politic by the name of "The Poor Knights of Windsor of the Foundation of Samuel Travers, Esq.," and by that name were to have perpetual succession and a common seal, with capacity to receive and hold for the ends and purposes of their institution the land or ground to be purchased for the purpose of erecting a house or building for their habitation, and the house or building to be erected thereon, as well

as the lands, tenements, and hereditaments in the county of Essex to be appropriated and set apart under the direction of the Court of Chancery for their support and maintenance, in such manner and under and subject to such conditions, restrictions, and regulations as the Court of Chancery should direct. The charter further ordained that there should be a governor of the said corporation, viz. the senior of the lieutenants members of the corporation according to their rank in the Royal Navy; and that the Chief Governor of Windsor Castle, the Dean of Windsor, and the Provost of Eton College for the time being, or any two of them, should be visitors of the said corporation; and that the said seven knights and their successors should observe and obey the rules, orders, and regulations thereinafter contained, and such further rules, orders, and regulations as the King, his heirs or successors, should at any future time make for the better government of the said knights or the better carrying the intention of the founder into execution, and as the Court of Chancery should also make or declare in furtherance of the will of the said Samuel Travers.

The charter further ordained that the said seven knights and their successors should lead virtuous, studious, and devout lives, and should daily attend Divine service in the chapel in Windsor Castle, and should live together in a collegiate manner in the house or building to be erected for their residence, and keep their table together in their common hall, and that such table should be provided out of their common stock or purse, and that they should not go away from and leave their said house and absent themselves therefrom for more than ten days in any one year without a licence first obtained for that purpose from the said visitors, upon reasonable cause; and that, during their residence at their said house, they should not lie out of their respective apartments, nor haunt the town, the ale-houses, or the taverns; and that the governor of the said seven knights for the time being should have the care and custody of their common seal; and that the other six should be obedient to the governor, and all the seven should be obedient to the said visitors in the observance of the rules, orders, and regulations therein contained, and of all others which the King, his heirs and successors, should thereafter make for their orderly behaviour and government.

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The charter further ordained that the said visitors should once in every year appoint a day and hour at which the said seven knights and their successors should be warned to be present, and should cause the rules, orders, and regulations to be read to them; and that, if any of them should neglect to attend, not having leave of absence from the said visitors, or should offend against the said rules, orders, and regulations, it should be lawful for the said visitors to impose a reasonable fine or penalty; and, in case the offence should seem to require such punishment, it should be lawful for them to give a solemn warning to the offender not to offend again in the like manner; and he that should have been twice so warned should upon the third offence be expelled or removed by the said visitors; and that, if any knight should refuse or neglect to pay any fine or penalty, he should be liable to be expelled or removed by the said visitors; and that the said visitors should also have full power to expel or remove any of the said seven knights and their successors who should marry or give occasion of scandal, or who might be convicted of felony or any notable crime; and that the seven knights and their successors should, before they were let into possession of the apartments to be erected for them, take their oaths that, during the time of their continuing such knights, they would observe, conform to, and keep all the rules, orders, and regulations contained in those presents, and all such other rules, orders, and regulations as should thereafter be made as aforesaid.

By indenture of bargain and sale bearing date the 26th of June, 1799 (approved by the master and inrolled in the Court of Chancery), Henry Emlyn conveyed a messuage or tenement, with the garden and ground thereunto belonging, situate in Datchet Lane, near Windsor Castle, in the parish of New Windsor, to the said poor knights and their successors, for the ends and purposes of their institution, and subject to such orders and regulations as the Court of Chancery should from time to time make concerning the same.

The college, which was erected on the ground so conveyed, consists of a range of buildings forming seven dwelling houses containing three apartments each, viz. kitchen, sitting, and bed-room, and of a mess-house, with kitchens and other offices at the back.

There is a colonnade in front of the houses, and a small lawn walled in, with a gate opening into Datchet Road.

The mess-house is separately rated to the poor-rate, and the rates payable in respect of it are paid out of the common fund of the college. Each knight keeps the house which he occupies in repair.

In the year 1867, the respondent was appointed by Royal warrant to supply a vacancy, and by virtue of that appointment he went into occupation of a vacant house in the college, which he chose with the consent of the governor. This is the house which he now occupies; and he holds it for his life, subject to his being expelled or removed for any of the causes above stated.

The respondent claimed to have his name retained upon the list, on the ground that he was the inhabitant occupier as owner of the house, and relied on *Fryer* v. *Bodenham*. (1) It was objected that the ownership of the houses was in the corporation aggregate, and not in each member of it separately; and *Heath* v. *Haynes* (2) was cited.

The revising barrister held that the respondent was the inhabitant occupier of the house as owner, and retained his name on the list.

If the Court should be of opinion that the respondent was the inhabitant occupier of the house as owner, his name was to be retained; otherwise, his name was to be expunged.

The cases of four other persons were consolidated with the principal case.

Nov. 17. *H. James, Q.C.*, for the appellant. The respondent does not occupy the house in question as owner, but as a member of the corporation aggregate, in whom the legal estate is vested. That individual members of a corporation aggregate cannot vote, even though the estates of the corporation are enjoyed by them in severalty by agreement among themselves, is clear: see Com. Dig. Franchises (F. 14.); Vin. Abr. Corporations (H. 2.); Male on Elections, 268; Heywood on County Elections, 114, 115 (*The Cambridgeshire Case*). Here, each of the knights occupies a particular

(1) Law Rep. 4 C.P. 529.

(2) 3 C. B. (N.S.) 389; 27 L. J. (C.P.) 50; K. & G. 99.

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house, for convenience; but the occupation is the occupation of the corporation by the individual member, who is subject to certain rules and regulations, and to removal for breach of them. No reliance is placed on the eleemosynary character of the occupation as disentitling the claimant to a vote, as it was once thought to do, though that circumstance has some bearing upon the question of ownership. *Heath* v. *Haynes* (1) is identical with the present case. There, each of the inmates of the Earl of Leicester's Hospital,—a charity regulated by a private Statute,—had allotted to him by the master rooms therein of more than the yearly value of 10*l*., of which he had the exclusive use; and the appointment was for life, subject to removal for breach of any of the rules: and it was held that they did not occupy as owners or tenants within s. 27 of 2 Wm. 4, c. 45. Cockburn, C.J., in giving judgment, says (2): "It is not enough to shew a beneficial occupation, unless it be an occupation as owner or in the legal relation of tenant to a landlord. Now, it is clear, and indeed it is conceded, that these parties do not occupy as owners,—the ownership of the property being ex concessis in the corporation aggregate. Then, do they occupy as tenants? It appears to me that they do not. There is nothing in the circumstances under which their occupation arises which creates either expressly or by implication the legal relation of landlord and tenant. The corporation occupies in the persons of its several members." So here, if the respondent is owner at all, it is as a member of the corporation. *Davis* v. *Waddington* (3) shews that such an occupation as this does not give even an equitable interest in the houses to the several occupants. In *Bridgewater* v. *Durant* (4), where one of the lay-clerks of Windsor claimed to be registered in respect of the occupation of the residence assigned to him by the dean and chapter, in whom the freehold was vested, Erle, C.J., says: "Occupation alone of a house is not sufficient to qualify. Thus, occupation as a member of a corporation aggregate,—*Heath* v. *Haynes* (1); or as a receiver of charitable bounty,—*Heartley* v. *Banks* (5); or for purposes connected with services

(1) 3 C. B. (N.S.) 389; 27 L. J. (C.P.) 50; K. & G. 99. 4 Jur N.S. 664

(2) 3 C. B. (N. S.) at p. 410; 27 L. J. (C.P.) at p. 54. 4 Jur N.S. 665

(3) 7 M. & G. 37; 1 Lut. 159.

(4) 11 C. B. (N. S.) 7, 12; 31 L. J. (C.P.) 46, 48. 8 Jur N.S. 590

(5) 5 C. B. (N. S.) 40; 28 L. J. (C.P.) 144; K. & G. 219. 5 Jur N.S. 493.

to be performed,—*Dobson* v. *Jones* (1); *Clark* v. *Bury St. Edmunds, Overseers* (2); or under an appointment from governors of a charity at their discretion,—*Davis* v. *Waddington* (3),—have been held not to qualify. . . . Upon the statement of the case, we do not find any proof that the appointment of a lay-clerk, together with an assignment of a house for his occupation, necessarily created any legal or equitable freehold interest in the house and vested it in him." In *Heartley* v. *Banks* (4), where the military knights of Windsor were held not to have such an interest in the houses occupied by them as to entitle them to be registered, Cockburn, C.J., said (5): "The legal estate is plainly in the dean and canons of Windsor; and, though they may be bound to allow the knights to occupy these houses, yet it appears that the dean and canons have power and authority to impose such restrictions on the enjoyment as to divest the occupation of the character of ownership." *Fryer* v. *Bodenham* (6) is clearly distinguishable. The decision in that case, which proceeded upon the authority of *Simpson* v. *Wilkinson* (7) and *Roberts* v. *Percival* (8), turned on the absence of any evidence to shew that the freehold was in any others than the servitors. In neither of the three last-mentioned cases was it suggested that the parties occupied as members of a corporation aggregate: they were treated as joint owners. In *Fryer* v. *Bodenham* (6), it was not known in whom was the freehold. Here it is known to be in the corporation, as well as how it became vested in them. In *Freeman* v. *Gainsford* (9), where the inmates of Earl Shrewsbury's hospital at Sheffield, who claimed to have a freehold estate or interest in rooms occupied by them under regulations very similar to these, were held not to be entitled to be registered, Erle, C.J., says (10): "I do not accede to the suggestion that the Court is put to its election between the case of *Simpson* v. *Wilkinson* (7) and that of *Heartley* v. *Banks*. (4) The question

(1) 5 M. & G. 112; 1 Lut. 105.
(2) 1 C. B. (N.S.) 23; K. & G. 90.
(3) 7 M. & G. 37; 1 Lut. 159.
(4) 5 C. B. (N.S.) 40; 28 L. J. (C.P.) 144; K. & G. 219.
(5) 5 C. B. (N.S.) at p. 56; 28 L. J. (C.P.) at p. 152.
(6) Law Rep. 4 C. P. 529.
(7) 7 M. & G. 50; 1 Lut. 168.
(8) 18 C. B. (N. S.) 36; 34 L. J. (C.P.) 84; H. & P. 121.
(9) 11 C. B. (N.S.) 68; 31 L. J. (C.P.) 33.
(10) 11 C. B. (N. S.) at p. 91; 31 L. J. (C.P.) at p. 38; K. & G. 448.

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submitted for the opinion of the Court in the former case was, not whether the claimants had an equitable freehold in the rooms allotted to them, but whether the revising barrister was right in holding that a legal foundation might be presumed not necessarily investing the claimants with a corporate character. And the judgment of the Court was confined to that." Cockburn, C.J., in *Heartley* v. *Banks* (1), distinguishes *Simpson* v. *Wilkinson* (2) on similar grounds.

Nov. 20. *H. Matthews, Q.C.*, for the respondent. The respondent occupies the house in question as owner. He has the exclusive occupation; and he keeps the premises in repair. It is no part of the duty of the revising barrister to inquire into the title: Rogers on Elections, 10th ed. 50. If the corporation chose, in breach of the trust, to assign to a stranger, and he occupied, the other requisites of the statute being complied with, he would be entitled to a vote. So, a deforciant might occupy as owner, within the statute. The only cases of occupiers who are excluded from voting are those of persons whose tenure is uncertain or precarious, as, for instance, that of a servant occupying for the purpose of his service, or poor persons in alms-houses, and the like. No estate, even equitable, need be shewn. The whole doctrine as to the incapacity of members of corporations aggregate to vote, rests upon the resolution in the *Middlesex Case* (3), where a prebendary of Westminster was held not entitled to vote in respect of his prebendal house, on the ground that the house was part of the estate of the dean and chapter, a body corporate, enjoyed in severalty by the owners according to an agreement among themselves. That, no doubt, is a sound decision. But here the respondent does not hold his house as a member of the corporation, though he acquired the right to occupy by reason of his being appointed a member of the corporation. He holds for life. Members or shareholders of a joint-stock company, whether incorporated or not,—*Bulmer* v. *Norris* (4), *Bennett* v. *Blain* (5), *Freeman* v. *Gainsford* (6), or of

(1) 5 C. B. (N. S.) at p. 57; 28 L. J. (C.P.) at p. 152.
(2) 7 M. & G. 50; 1 Lut. 168.
(3) 2 Peck. 113.
(4) 9 C. B. (N. S.) 19; 30 L. J. (C.P.) 25; K. & G. 321.
(5) 15 C. B. (N. S.) 518; 33 L. J. (C.P.) 63; H. & P. 35.
(6) 18 C. B. (N. S.) 185; 34 L. J. (C.P.) 95; H. & P. 255.

an incorporated fishery company,—*Acland* v. *Lewis* (1), who are entitled merely to participate in the profits of the concern, acquire no votes. So, in cases like the present, where the inmates are subject to an arbitrary power of amotion they have been held not entitled to vote, their occupation being precarious: but, where the occupation has been as of right and of a permanent character, the vote has always been allowed. It is, no doubt, difficult to reconcile *Heath* v. *Haynes* (2) with some of the cases. But the point now taken was not urged there. The facts shewed that the occupation was of a precarious character. It has never yet been held that the individual members of a corporation aggregate cannot have an equitable estate in a portion of the property of the corporation. If the mere fact of the claimant being a member of a corporate body was enough to disentitle him to the franchise, the discussion in *Davis* v. *Waddington* (3) was idle. In *Beeson* v. *Burton* (4), the respondent was held entitled to be registered as the occupier of a "freeman's allotment" under a local Act.

[BOVILL, C.J. There was an express trust there to divide the land into plots, and allot them among the freemen of the borough.]

But not an express trust to allow them to occupy the particular plot.

[WILLES, J. The uncertainty of the situation of the particular plot would not, according to Co. Litt. 4. a., be any obstacle to the acquisition of a freehold interest.]

In *Heartley* v. *Banks* (5) there was no finding, as there is here, that the tenure of the military knights was of a permanent character. In *Bligh* v. *Brent* (6), the case of a corporation is likened to that of an ordinary trust.

H. James, Q.C., in reply. The rule which excludes members of a corporation aggregate from voting is equally applicable to borough as to county votes, as appears by the resolution of the House of Commons in the *Cambridgeshire Case* (7) in 1624. See

(1) 9 C. B. (N. S.) 32; 30 L. J. (C.P.) 29; K. & G. 334.
(2) 3 C. B. (N. S.) 389; 27 L. J. (C.P.) 50; K. & G. 99.
(3) 7 M. & G. 37; 1 Lut. 159.
(4) 12 C. B. 647; 22 L. J. (C.P.) 33; 2 Lut. 225.
(5) 5 C. B. (N. S.) 40; 28 L. J. (C.P.) 144; K. & G. 219.
(6) 2 Y. & C. Ex. 268.
(7) Cited in Heywood on County Elections, 115.

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also Dalton's Sheriff, 334; Rogers on Elections, 10th ed., 30: and see the judgment of Erle, C.J., in *Freeman* v. *Gainsford*. (1)

BOVILL, C.J. The question raised in this case is, whether the respondent was entitled to be registered as a voter for the borough of New Windsor as a person who occupied a house as owner or tenant, all the other requisites of the statute having been satisfied. It was contended on his behalf before the revising barrister, that the case came within the decision of this Court in *Fryer* v. *Bodenham* (2), where one of the servitors or inmates of Lord Coningsby's Hospital was held entitled to vote; and it has also been contended before us that it comes within the principle established by this Court in the case of the bedesman of Lord Burleigh's Hospital, *Roberts* v. *Percival*. (3) On the other hand, it was contended before the revising barrister that the case was governed by the decision in the case of Lord Leicester's Hospital, *Heath* v. *Haynes*. (4) With regard to the cases relied on by the respondent, it is to be observed that neither the servitors in the one case nor the bedesmen in the other were members of any corporate body; that there was an independent body of trustees who held in trust for the servitors in the one case and for the bedesmen in the other; and that those cases were decided upon the facts stated or upon the express finding of the revising barrister. But the case now before the Court is one where there is a corporation aggregate, and the respondent is, in effect, claiming to vote as a member of that corporation. The corporation is in the nature of a collegiate establishment of an eleemosynary character, where the corporate property is held for the purposes of the corporation and for the benefit of the members as a corporate body, and where, for the sake of convenience, the original institution contemplated one house in which the whole body should reside. The corporation having acquired certain property, houses therein were assigned to the different members, in accordance with the general object and intent of the incorporation; but the assignment of these houses seems to me to have been merely as a more convenient occupation of the property and its

(1) 11 C. B. (N. S.) at p. 91; 31 L. J. (C.P.) at p. 38.
(2) Law Rep. 4 C. P. 529.
(3) 18 C. B. (N. S.) 36; 34 L. J. (C.P.) 84; H. & P. 121.
(4) 3 C. B. (N. S.) 385; 27 L. J. (C.P.) 50; K. & G. 99.

enjoyment by the corporate body. No instance has been produced before us where the individual members of a corporation aggregate occupying the property as members of the corporate body have been held entitled to vote. From the earliest times there are resolutions of the House of Commons upon express decisions of committees, coming down to a recent period, which are authorities against such a proposition. It is quite true, as Mr. Matthews has contended, that, in some of those cases, the point now before the Court did not arise, and that some relate to county votes. But the general principle is stated clearly and distinctly. And, though with respect to county votes something more is required than in respect of the occupation franchise for boroughs, yet, to give the borough franchise, the occupation must be as owner or tenant. In the earlier cases referred to of deans and members of chapters, the ground on which it was held that the person claiming was not entitled to vote was, that the property he occupied was part of the estate of the corporation enjoyed in severalty by mere private arrangement. A similar notion prevailed in the later cases. There are other cases of a like character in which it has been held that members of a corporation holding part of the corporate property are not as a general rule entitled to vote. The latest case directly on the point is that of *Heath* v. *Haynes*. (1) In that case, as here, the brethren were incorporated: each had a separate residence, as here, and the exclusive occupation of that residence, and yet it was held that they were not entitled to vote; and that decision, which is in accordance with the highest authorities, was on the ground that the ownership of the corporation was not an ownership in the individual members who formed the corporation. They did not occupy "as owners or tenants," within s. 27 of the Reform Act. That is a precise decision upon the point, and is not in my judgment distinguishable from the present case. That that was considered to be the law, is clearly shewn by the recent case of *Roberts* v. *Percival* (2), the case of the bedesmen of Lord Burleigh's Hospital. It had been decided in 1844, in the case of *Simpson* v. *Wilkinson* (3), that these bedesmen were entitled to vote. The

(1) 3 C. B. (N. S.) 389; 27 L. J. (C.P.) 50; K. & G. 99.

(2) 18 C. B. (N. S.) 36; 34 L. J. (C.P.) 84; H. & P. 121.

(3) 7 M. & G. 50; 1 Lut. 168.

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revising barrister, upon the facts then before him, considered that a legal foundation might be presumed not necessarily investing the claimants with a corporate character, and that they were respectively entitled to a separate freehold estate in their respective rooms; and the Court held that his conclusion was right in point of law, and warranted by the facts. But, in 1864, another case arose (*Roberts* v. *Percival*) (1), in which further facts were brought to the attention of the revising barrister, upon which it was contended on the part of those who opposed the claim to the franchise, that, assuming the legal origin of the foundation, if the claimants had any estate, it was only as members of a corporation aggregate; and thus the point was distinctly raised. Erle, C.J., referring to the former case, says (1): "The origin of the hospital was unknown, and we held that the revising barrister was warranted in inferring from the ordinances and the statute 39 Eliz. c. 5 (referring to a former statute of 35 Eliz. c. 7) that it had been founded by Lord Burleigh under licence from the Crown, and indowed with a grant of land to trustees or feoffees in trust for the use of the bedesmen. It seems to me that the interest of the inmates under such an indowment, if it stood there, would have been an equitable freehold in the property, the legal estate being in the trustees, just as, if incorporated under the 39th Eliz. c. 5, the legal estate would be vested in the corporation,—except that in that case the members of the corporation would acquire no right to vote. The difference consists in this. Members of a corporation aggregate are not qualified to vote, because the interest in the property is vested in the corporation; and that is the way in which by far the larger portion of these hospitals are indowed. But, if the lands are conveyed to feoffees in trust for the members, the legal estate would be in the feoffees, and the equitable interest would be in the members of the institution according to the terms of the deed." And further on he says (2): "There is ground for inferring that the legal estate was originally in the feoffees; but there was abundant evidence, from the mode of user, to authorize the Court in holding that each of the bedesmen took a separate equitable freehold in the room assigned to him, the rest of the

(1) 18 C. B. (N. S.) 36, 42; 34 L. J. (C.P.) 84, 86. 11 Jur. (N.S.) 840, 841

(2) 18 C. B. (N. S.) at p. 43; 34 L. J. (C.P.) at p. 86. 11 Jur. (N.S.) 842.

beneficial interest in the property of the hospital being in the warden and bedesmen." In that case, as here, each inmate when elected was allotted certain rooms. In the present case, instead of its being stated as a fact that the respondent had the house assigned to him for his life, the charter is set out, shewing the original constitution of the corporation; and the case states that, in the year 1867, the respondent was appointed by Royal warrant to supply a vacancy, and that by virtue of that appointment he went into occupation of a vacant house in the college, which he chose with the consent of the governor: and the case further states that he holds it for his life, subject to his being expelled or removed for any of the causes mentioned in the charter. Having the charter before us, the only conclusion I can come to upon the facts stated, is, that Mr. Kennett occupied only as a member of the corporation, having no right or estate in him independent of the corporation. It seems to me that it is impossible to distinguish this case from the decision of this Court in *Heath* v. *Haynes* (1), confirmed as it is by the observations of Erle, C.J., in *Roberts* v. *Percival* (2), and that there is an entire absence of authority to shew that a member of a corporate body enjoying such rights as are here described is entitled to be registered.

Mr. Matthews urged very strongly that this case should be considered as if the fee were vested in the corporation in trust for the individual members, and that they had a right independent of the corporation. That can hardly be stronger than the case where the fee is vested in an independent body of trustees. Where that is the case, and the trusts are known, the character of the occupation depends on the nature of the trust, and the conditions of the occupation. In all the cases where these have been known, the Court considered the party not entitled to a vote. The cases of the bedesmen, *Roberts* v. *Percival* (2), and of the servitors, *Fryer* v. *Bodenham* (3), were cases where the nature of the trusts was unknown, but was only to be inferred from the circumstances; and the Court held that enough appeared to enable them to infer that the fee was vested in some third persons in trust for the claimants, and that they had

(1) 3 C. B. (N. S.) 389; 27 L. J. (C.P.) 50; K. & G. 99.

(2) 18 C. B. (N. S.) 36, 42; 34 L. J. (C.P.) 84, 85; H. & P. 121.

(3) Law Rep. 4 C. P. 529.

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equitable estates for life. But, in all the cases where the trusts have been brought to the attention of the Court, the parties have been found not to have occupied either as owners or tenants. Without going through the whole of the authorities cited, I will merely refer to one or two, in order to shew the general character of the occupation in institutions of this kind; for, though it is held that the circumstance of their being of an eleemosynary character will not deprive the inmates of the right of voting, still it is an essential element in considering what the nature of the occupation is. In *Freeman* v. *Gainsford* (1), where each inmate, on his election, was placed in certain rooms, with certain allowances, which rooms he was prohibited from letting or assigning, or permitting any person to occupy jointly with him, and from which he was removeable by the governing body if found guilty of certain irregularities; it was held that, under the constitution of the hospital, the assigning of the rooms to the inmate did not create in him any estate or interest in them, but that he was placed therein merely as an object of charity; and there is a very clear exposition of the nature of this occupation in the judgment of Williams, J., who says (2): "The occupier of a residence as part of the benefits of a charitable institution is not entitled to an estate of freehold therein, unless the founder has expressly assigned it to him directly or indirectly during his life. . . . I assume that the claimant would have a freehold interest in the rooms allotted to him, if he had any property in them. But the question is whether he has *any property*. I am of opinion that he has none. The language of the constitution simply is, that the accommodation provided for the recipients of the charity shall be regulated in a certain way. They are to take for their lives, subject to removal for any of the offences specified. But it does not therefore follow that the particular rooms are to be assigned to each of them *as owner* for his life. It seems to me to be clear that he has not the right of an equitable owner at all. If he had, although the purposes of the charity might require him to be removed to another set of rooms, he might set the governor at defiance. It is quite manifest that no such state of things as that

(1) 11 C. B. (N. S.) 68; 31 L. J. (C.P.) 33; K. & G. 448.

(2) 11 C. B. (N.S.) at p. 92; 31 L. J. (C.P.) at p. 38; K. & G. at pp. 472, 473.

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could have been intended. It is simply the case of a number of persons placed on a charitable foundation, who by the regulations of the charity are entitled to be properly and reasonably accommodated with chambers to live in, and other allowances. Having a right to be so supplied does not constitute them equitable owners of the rooms in which they are placed." Although those observations are made in reference to a case in which the question was as to a county vote, the principle defining the character of the occupation is precisely applicable to this case, and shews that the respondent here could not be entitled to claim in respect of an occupation either as owner or as tenant. There is also the case of *Bridgewater* v. *Durant* (1), where a lay-clerk of Windsor appointed to a house the freehold of which was in the dean and canons of Windsor, without whose consent the occupant could not let the premises, was held not to occupy either as owner or tenant under 2 Wm. 4, c. 45, s. 27. In *Heartley* v. *Banks* (2), the military knights of Windsor, who were not incorporated, and who had houses assigned to them of which, as here, they had the exclusive possession, subject to certain rules and regulations, but of which the freehold was vested in the dean and canons of Windsor, were held not to occupy as owners or tenants; their occupation being considered to be subordinate to the general objects and purposes of the Royal bounty. It seems to me that the ground upon which that case was decided applies precisely to this, and determines the nature and character of the occupation quite independently of the general ground that, as members of a corporate body, these naval knights are not entitled to vote. Their occupation is as members of the corporation, for the purpose of convenience. The corporation are owners of the fee-simple; and there is nothing whatever to shew any estate or property in the individual members. The members are subjected to a variety of regulations which are altogether incompatible with the acquisition of any estate or property in the houses they occupy. The character of their occupation is precisely similar to that of the military knights in *Heartley* v. *Banks*. (2) They do not occupy either as owners or as tenants. Their position as to assignment of residence is more like that of undergraduates at the

(1) 11 C. B. (N.S.) 7; 31 L. J. (C.P.) 46; K. & G. 377.

(2) 5 C. B. (N.S.) 40; 28 L. J. (C.P.) 144; K. & G. 219.

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universities, or the inmates of alms-houses, who have no estate either legal or equitable.

For these reasons, I am of opinion that the decision of the revising barrister must be reversed.

WILLES, J. I am of the same opinion. When the principle applicable to this case is borne in mind, the conclusion is inevitable that these naval knights have no votes; and the principle is that upon which Mr. James founded his argument, viz. that the members of a corporation aggregate cannot vote. That is the rule; and, although it is true, as urged by Mr. Matthews, that the members of a corporate body may have a distinct estate in portions of the corporate property, or that there may be a tenure as between the corporation and individual members, before we can act upon it we must be satisfied that such an estate or tenure has been created by some means known to the law. We must not by a strained construction of the facts enable a corporation aggregate to do indirectly that which it cannot do directly. Primâ facie, where property of a corporation aggregate is occupied by its members, the occupation of the particular part does not create a tenancy or confer any exclusive right; the occupation is that of the corporation itself through its members. The facts relied upon on the part of the respondent to shew a distinct ownership in him are thus stated in the case:—"In the year 1867, the respondent was appointed by Royal warrant to supply a vacancy, and by virtue of that appointment he went into occupation of a vacant house in the college, which he chose with the consent of the governor; and he holds it for his life, subject to his being expelled or removed for any of the causes above mentioned." He does not found his claim upon an occupation as tenant. He could not do so. There is no tenancy. If he holds at all, it is as owner. What, then, are the circumstances under which he holds? It appears that, in the year 1773, a Mr. Travers left by his will property the recipients of which I will not deal with as persons who are receiving alms. I leave out all considerations of that kind, though I am far from thinking that the circumstance of an enjoyment being eleemosynary has nothing to do with the decision of this question. I think each of the members of this

corporation or college has a right to all the benefits intended by the generosity rather than the charity of Mr. Travers, the founder.

The will provides for a common habitation for the knights, in which it was intended they should all live together in a collegiate manner, and have a common table. No house appears to have been built for a considerable time. The matter came under the consideration of the Court of Chancery in 1793, and the result was that an order was made by which it was declared that the erection of a habitation for the knights would be a proper execution of the trusts: and, finally, that which was part of the wish of the testator, that the Crown would be pleased to incorporate the knights, took effect in the year 1798, when the charter was obtained. The charter, which is even more express than the will, ordained amongst other things that "the knights and their successors should lead virtuous, studious, and devout lives, and should daily attend Divine service in the chapel in Windsor Castle, and should live together in a collegiate manner in the house or building to be erected for their residence, and keep their table together in their common hall," &c. Then followed regulations to be observed by the knights in reference to their houses or apartments. Amongst other things, they were to be liable to expulsion if they habitually broke the rules, or if they married or gave occasion for scandal, &c. What is the result of persons holding houses or rooms under such circumstances? I will give my opinion in the words which I have written down, in order to put the matter clearly.

I think that the knights have no such exclusive or permanent right in or to these houses as to constitute a several property or occupation, any more than if, besides using a common hall, they used also a common dormitory. The system of appropriation is, not of strict right, but only for convenience, founded on usage, not amounting to prescription; and is only an habitual mode of enjoying the corporate property without a transfer of ownership or the creation of a tenancy. As to ownership, that remains in the corporation. As to tenure, each of the knights, by allotment or consent of the master,—which is not a mode of creating a tenancy, and does not make the knight a tenant in any sense,

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either legal or popular,—occupies certain rooms, which it is usual and decent to allow him to occupy during good behaviour. There is no occupation, therefore, as owner or tenant; and the decision of the revising barrister must be reversed.

KEATING, J. This is the case of a claimant who occupies simply and solely as a member of the corporation a part of the building held by the corporation for the purposes expressed in the charter. Occupying in that capacity alone, the industry of Mr. Matthews has been unable to find any case in which it has been held that a member of a corporation occupying under such circumstances would be entitled to vote. No such case in reality exists; and the principle which would prevent us from so holding has been long recognized. That principle has been applied to county votes, and has been extended by a resolution, to which Mr. James called our attention, to the case of votes for burgesses. In addition to that, there is an express decision of this Court in *Heath* v. *Haynes* (1), which all the ingenuity of Mr. Matthews has been unable to distinguish from the present case in any substantial particular. No doubt, he pointed out some minute differences in details and circumstances, but he was unable to shew any real distinction between the two cases; so that it would be impossible for us, without overruling *Heath* v. *Haynes* (1), to find that the claimant here had a right to vote. Upon these grounds, which have been more fully stated by my Brother Willes, in whose judgment I entirely concur, as well as in the reasons given by My Lord, I agree in thinking that the decision of the revising barrister must be reversed.

BRETT, J. I also am of opinion that the claimants had no vote, because they occupy their respective houses only as members of a corporation aggregate, and not in the character of owners or tenants. I think that alone would have been sufficient to dispose of the case. But I further think they had no vote, because there was a governing body who had a discretionary control over the occupation, which deprived it of the essential elements of an occupation as owner. The case resembles *Heath* v. *Haynes* (1) and

(1) 3 C. B. (N. S.) 389; 27 L. J. (C.P.) 50; K. & G. 99.

Heartley v. *Banks* (1), neither of which has been overruled or impeached.

In *Heath* v. *Haynes* (2), the brethren were held not to be entitled to vote because they occupied as members of the corporation, and not as owners or tenants; and it was said that, if they were interfered with in their occupation, the only remedy would be by application to the Court of Chancery to have the charity administered according to the will of the founder. In *Heartley* v. *Banks* (1), the claimants were not members of a corporation aggregate, but of a charitable foundation, the funds of which were vested in trustees who had authority to impose such restrictions on the enjoyment as to divest the occupation of the character of ownership. That was a decision pronounced after deliberation, by Cockburn, C.J., who said that the Court had come to the conclusion that "the occupation was only as subordinate to the purposes of a charity, and subject to the immediate control of the superiors of the institution," and so not an occupation as owners. So, in *Freeman* v. *Gainsford* (3), the inmates of the Earl of Shrewsbury's Hospital at Sheffield, were held, under circumstances very like those in the present case, not to have such an estate or interest in the rooms which they occupied as to entitle them to be registered; their occupation being merely subservient to the general objects of the foundation. Erle, C.J., points out in his judgment (4) the true distinction between that case and *Simpson* v. *Wilkinson*. (5) And in *Roberts* v. *Percival* (6), the ground of the decision is thus put by Erle, C.J. (7): "Members of a corporation aggregate are not qualified to vote, because the interest in the property is vested in the corporation; and that is the way in which by far the larger portion of these hospitals are indowed. But, if the lands are conveyed to feoffees, in trust for the members, the legal estate would be in the feoffees, and the equitable interest would be in the members of the institution, according to

(1) 5 C. B. (N. S.) 40; 28 L. J. (C.P.) 144; K. & G. 219.

(2) 3 C. B. (N. S.) 389; 27 L. J. (C.P.) 50; K. & G. 99.

(3) 11 C. B. (N. S.) 68; 31 L. J. (C.P.) 33; K. & G. 448.

(4) 11 C. B. (N. S.) 91; 31 L. J. (C.P.) at p. 38.

(5) 7 M. & G. 50; 1 Lut. 168.

(6) 18 C. B. (N. S.) 36; 34 L. J. (C.P.) 84; H. & P. 121.

(7) 18 C. B. (N. S.) at p. 43; 34 L. J. (C.P.) at p. 86; H. & P. at p. 125.

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the terms of the deed." For these reasons I concur in the reversal of the decision of the revising barrister.

Decision reversed. (1)

Attorney for appellant: *Thomas Durant.*

Attorneys for respondent: *Taylor & Son, for C. T. Phillips, Windsor.*

Nov. 23.

FORD, APPELLANT; HARINGTON, RESPONDENT.

Parliament—Borough Vote—Qualification—Corporation Aggregate—Canon—Occupation of Residentiary House.

Dent 262

The dean and chapter of Exeter are a corporation aggregate; there are five canons in the chapter, who are appointed for life, and five houses which the canons are entitled to occupy, and with their enjoyment of which the chapter cannot interfere. At the election of a canon he produces the key of the house occupied by his predecessor, and prays to be admitted. As one of the canons he is elected and decreed to be installed, and thereupon takes possession of his house. Each canon repairs his house at his own expense:—

Held, that the proper inference was that each canon holds his house as a corporation sole and not as a member of the chapter; and that he is therefore entitled to a vote for the city in respect of it.

APPEAL from the Revising Barrister for the city of Exeter.

Brutton Ford duly objected to the name of the Rev. Edward Charles Harington being retained upon the list of voters for the city, as well in respect of his ownership of a freehold house in the city as of his occupation of the house.

The Rev. Edward Charles Harington is one of the canons residentiary of the cathedral church of St. Peter in Exeter, and his qualifying property is the residentiary house belonging to him in respect of his canonry.

The dean and chapter of the cathedral are a corporation aggregate, consisting of the dean and five residentiary canons and sixteen non-residentiary prebendaries.

There are five canons who are appointed for life, and five houses which the canons are entitled to occupy, and with their enjoyment of which the chapter, as a body, cannot interfere.

At the election of a canon he produces the key of the house occupied by his predecessor and prays to be admitted.

(1) See the next case.

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As one of the canons he is elected and decreed to be installed, and thereupon takes possession of his house. No evidence was produced to show how he gets the key.

The senior canon has the right of occupying the vacant house if he chooses, and that right has been exercised. Each canon must reside three months. Each canon repairs his house outside and in, at his own expense. At one time there were more canons and houses than there are now. For some years two of the canons, Canon Martin and Canon Butt, occupied the same house during their respective residences. The canonical residences, on the suppression of the canonries, were let, and the rents paid into the common fund of the chapter. The present canons have occupied the houses in which they are now living ever since their appointments.

The questions for the decision of the revising barrister were:—

1. Whether Harington was entitled to such an estate or interest of freehold in his residentiary house as entitled him to vote.

2. Whether he occupied the same house as owner or tenant.

The revising barrister decided both questions in the affirmative, and retained the name of Harington both on the freeholders and occupiers lists.

Kingdon, Q.C., for the appellant. This case comes within the authority of *Durant* v. *Kennett* (1) just decided, for it is found that the respondent is a member of the chapter, which is a corporation aggregate, and when there is a vacancy the new canon goes to the chapter and prays to be admitted, which shows that he occupies as a member of that body and that the property is in them.

Philpott, for the respondent. This case is clearly distinguishable from *Durant* v. *Kennett* (1): for it is found in terms that the house belongs to the respondent in respect of his canonry; he does not therefore occupy it as the naval knights of Windsor occupy their houses, only as a member of the general body. That was the point raised before the revising barrister, and the respondent contended that the house belonged to him as a corporation sole and not as a member of the chapter, and that the case therefore did not come within *Heath* v. *Haynes* (2) which was similar to *Durant* v.

(1) Ante, p. 262. (2) 3 C. B. (N.S.) 389; 27 L. J. (C.P.) 50.

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Kennett. (1) It is found that the chapter as a body cannot interfere with the occupation of the house, and that shows that they are not the occupiers. It was a question of fact for the revising barrister whether the house belonged to the corporation aggregate or the corporation sole, both of which as a matter of law are known to exist, and he has found expressly that it belongs to the corporation sole. In *Gleaves* v. *Parfitt* (2) it was held that a vicar choral of Wells held his house in his own right and not as a member of the corporation aggregate, and could sue the executors of his predecessor for dilapidations. A form in Fitzherbert's Natura Brevium, p. 194, shews that the old writ for the recovery of a prebendal house was in the name of the prebendary, and that he claimed it in right of his prebend. It is true that the houses belonging to the suspended canonries have been let by the chapter and the rent paid into the common fund, but that was under the express powers of 3 & 4 Vict. c. 113, s. 58, under which the canonries were suspended. By s. 59 of that Act express power is given to the canons to raise funds on the security of their canonries for the repair or enlargement of their residentiary houses, which is a strong proof that the houses belong to them in right of their individual canonries. (3)

[WILLES, J. In the *Middlesex Case* (4) the case of the prebendaries of Westminster were considered. There, however, the houses were repaired out of the common fund and the prebendaries were at liberty to change their houses.]

(1) Ante, p. 262.

(2) 7 C. B. (N.S.) 838; 29 L. J. (C.P.) 216.

(3) 3 & 4 Vict. c. 113, s. 58:—"So soon as conveniently may be measures shall be taken, by the deans and chapters of the several cathedral and collegiate churches, for the disposal of such residence houses now under their control, and houses attached to any dignity, office, or prebend, in the precincts of the respective cathedral and collegiate churches as may be no longer required in such way as they shall deem fit, according to plans to be from time to time prepared by the respective chapters, and when approved by the visitors be submitted to the Ecclesiastical Commissioners for England, and may be confirmed by the authority hereinafter provided."

S. 59:—"It shall be lawful for the said commissioners to authorize any dean or canon of any cathedral church to raise moneys on his deanery or canonry for the purpose of building, enlarging, or otherwise improving the residence-house thereof, on such terms and conditions as the said commissioners, with the concurrence of the bishop and the chapter, shall approve."

(4) 2 Peck. pp. 99 and 113.

The liability of the corporation aggregate to repair them was a strong indication in that case of their ownership of the houses; but the decisions of committees of the House of Commons are not binding authorities on this Court, as was stated by Tindal, C.J., in *Whithorn* v. *Thomas*. (1) The canons can claim for dilapidations from the representatives of their predecessors, as appears from *Dr. Sand's Case* (2), and the case finds expressly that the canons of Exeter do repair their own houses. The duties of the corporation aggregate cannot require houses of residence; the corporation cannot preach, for example, or perform other cathedral services: *Sutton Hospital Case* (3) and *Case of the Dean and Chapter of Norwich*. (4) Those duties are performed by the canon in his capacity of a corporation sole, and it is for those purposes the house is required. The revising barrister was right, therefore, in holding that the respondent had an equitable freehold interest in the house and occupied it as owner.

Kingdon, Q.C., in reply. The respondent being a member of the corporation aggregate, it is for him to shew that he does not occupy the house in that character, and the statements in the case do not shew this. He would have the house in respect of his canonry, whether he held it because as canon he was a member of the chapter, or solely in his own right. Then as to the chapter not interfering, and the canon being bound to repair, this may all arise from bye-laws made by the chapter respecting the management of their property, which they have power to make. In several cases in which the vote has been disallowed, the claimants have been entitled to their houses for life, unless guilty of felony or murder, and yet the occupation has been considered to be as a member of the corporation. In *Gleaves* v. *Parfitt* (5), it was found that the vicars choral were collated to their houses by the bishop, not by the corporation aggregate of which they were members; here the canons apply to the chapter to be admitted, which is strong evidence that the houses are the property of the chapter.

[WILLES, J., referred to Fitzherbert, Natura Brevium, 194, as shewing that the assent of the bishop or chapter might be necessary

(1) 1 Lutw. 125.
(2) Skin. 121.
(3) 10 Rep. 23.
(4) 3 Rep. 73.
(5) 7 C. B. (N.S.) 838; 29 L. J. (C.P.) 216.

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before admission, though the property was held by the canon as a corporation sole.]

The house mentioned by Fitzherbert does not appear to have been a residentiary house, but a house on one of the estates with which the prebend was endowed.

[WILLES, J. I suppose the old chapters are descended from the regular clergy, and that originally therefore the property must have been held by them as a body.]

The presumption therefore is that this house is the property of the chapter, and occupied by the respondent as a member of it, and the case does not shew anything inconsistent with this; the respondent therefore is not entitled to vote.

BOVILL, C.J. The respondent in this case as one of the chapter, is a member of a corporation aggregate, and if his occupation were in that character alone it is clear that he would not be entitled to vote: the case would then fall within the decisions of *Heath* v. *Haynes* (1) and *Durant* v. *Kennett*. (2) In those two cases the Court came to the conclusion from the facts presented to it that the claimant occupied only as member of the corporation aggregate. In the present case the respondent has two characters: one as a member of the corporation aggregate, and one as a corporation sole in respect of his office as canon; for there can be no doubt that a canon is a corporation sole. There is some property which belongs to the corporation aggregate, and some which belongs separately to each of the canons; and in Burn's Ecclesiastical Law, vol. ii. p. 90, it is said: "The possessions of the dean and chapter are for the most part divided; the dean having one part alone in right of his deanery, and each particular prebendary a certain part in right of their prebends; the residue the dean and chapter have alike; and each of them is to this purpose incorporate by himself. For a prebendary, who hath a distinct estate, and hath also a vote in the chapter, is a corporation sole in respect of the one, and at the same time is a member of a corporation aggregate in respect of the other."

In the present case it appears to me to be clear, upon the statement of the revising barrister, that the respondent has a separate

(1) 3 C.B. (N.S.) 389; 27 L. J. (C.P.) 50. (2) Ante, p. 262.

property in the house in question, and is subject to separate liabilities in respect of it. If on the death of the respondent the house he occupied as canon were dilapidated his executors would be liable to the succeeding canon, as was decided in *Radcliffe* v. *D'Oyly* (1), the principle of which case was extended to the vicars choral of Wells, in *Gleaves* v. *Parfitt.* (2) It has also been held that when a prebendary has an advowson to which he is entitled in right of his prebend, and the incumbent dies, and the prebendary dies afterwards before the benefice is filled up, his executors shall have the right of presentation: *Rennell* v. *Bishop of Lincoln* (3), confirmed in the House of Lords under the name of *Mirehouse* v. *Rennell.* (4) In Burn's Ecclesiastical Law, vol. ii. p. 92, it is also said: "By the statute of 28 Hen. 8, c. 11, the profits of a prebend during the vacation shall go to the successor towards the payment of his first fruits. In order to reconcile which, perhaps the distinction may be this: that the issues of those possessions which he hath in common with the rest of the chapter shall after his death be divided among the surviving members of the chapter; but the profits of those possessions which he hath in his separate capacity as a sole corporation of himself shall be and inure to his successor." The form of the writ given in Fitzherbert's Natura Brevium, p. 194, is strongly confirmatory of the same view, though it is subject to the observation made respecting it by Mr. Kingdon. From these authorities it is clear that for many purposes a canon must be considered to hold his residentiary house in severalty, and upon the statement of this case I come to the conclusion that the respondent holds his house as a corporation sole and in his own right, and is therefore entitled to vote. No doubt in some of the older authorities it was considered that a prebendary was not entitled to vote, particularly in the *Middlesex Case.* (5) But, on the other hand, Mr. Elliott, in his book on Qualifications and Registration, p. 24, referring to Heywood on County Elections, 2nd ed., p. 125, says: "With respect to chapters where the dean and each prebendary have a certain separate portion in right of their offices, each is a corporation sole, and may vote; but where the whole annual income

(1) 2 T. R. 630.
(2) 7 C. B. (N.S.) 838; 29 L. J. (C.P.) 216.
(3) 7 B. & C. 113.
(4) 8 Bing. 490.
(5) 2 Peck. 113.

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is divided amongst them as a corporation aggregate, they cannot vote." It is to be observed that in the *Middlesex Case* (1), it was contended that the members of the chapter occupied separately by agreement among themselves; and another circumstance, although perhaps not so important, was, that the houses were repaired by the chapter. If the facts of that case really shewed that the members of the corporation held in severalty only by agreement there can be no doubt the decision was right; but it seems to me that the present case falls within the rule given in Mr. Elliott's book respecting prebendaries who occupy a certain separate portion of property in right of their offices. The dean and chapter cannot occupy as a body, nor can they interfere with the occupation of the respondent. He seems to me to be entitled to a freehold office for life, and to a house as belonging to it, with all the rights and liabilities attached to it by law, one of which is a right to vote in the election for a member for the city of Exeter.

WILLES, J. I am of the same opinion, and I adhere to what the Court has laid down in *Durant* v. *Kennett* (2), that where a member of a corporation aggregate occupies a house in pursuance of the objects of the corporation, primâ facie his occupation is theirs; and I think it would be straining a point to say that because he is allowed to occupy the house for life, unless he does something to induce the corporation aggregate to turn him out, therefore he can be said to have an estate in it. That, however, is the whole extent of the decision. It is open to a member of the corporation to rebut the primâ facie presumption by shewing that there is a distinct ownership in him; and the discussion on the Bench in *Durant* v. *Kennett* (2) all went to decide whether there was sufficient evidence of that on the facts. Has, then, the respondent done so in this case? The findings of the revising barrister are precise, and it appears that the house is taken by the respondent in succession to predecessors, and also that he has the house in respect of his canonry. The revising barrister has not stated the facts upon which he arrived at this conclusion; and in ordinary cases, and in reference to a corporation aggregate with the nature of which we were not so well acquainted

(1) 2 Peck. 113. (2) Ante, p. 262.

as we are bound to be with that of a dean and chapter, I should have thought that the case should go back, that the facts relating to the corporation and its members might be more fully stated; because it is necessary that each member should have the character of a corporation sole, in order to be able thus to hold lands separately in succession, and that character only certain persons are known to the law to have; and if any other person should claim to hold in that right, and was found so to do by the revising barrister, it might be necessary for the revising barrister to set forth the facts from which that conclusion was arrived at, in order that the Court might be sure that he had not jumped at it as a mode of solving the difficulty. But we are aware that each member of a chapter, if he has separate property which he holds in succession to his predecessors, is a corporation sole, and that there is a strong probability therefore that the respondent may hold his house as his separate property, and not as his share of property belonging to the chapter. This appears from Com. Dig. Tit. Ecclesiastical Persons, (C. 3) and (C. 4), and *the Case of The Dean and Chapter of Norwich.* (1) A prebendary is capable of taking as a corporation sole, and if he takes at all must take as such, and that is sufficient to disarm all suspicion respecting the finding of the revising barrister without his having set out the facts. I see therefore no reason to doubt the findings of the revising barrister, or for not taking them literally; and no doubt would have arisen in the matter if this, instead of being a residentiary dwelling, had been a living attached to the canonry.

The only circumstance on which much stress was laid by Mr. Kingdon was the fact of leave having been asked of the dean and chapter before the canon took possession of the house; but formerly the bishop, in dealing with the temporalities of the bishopric, used to require the consent of the dean and chapter, as appears from *the Case of The Dean and Chapter of Norwich.* (1) Moreover, the licence of the dean and chapter might be necessary to give the canon corporal possession of the house. All doubt on the subject, however, is removed by the precedent in Fitzherbert (2), from which it appears that a licence was required for holding over the house belonging to the prebend there mentioned, and yet that a separate

(1) 3 Rep. 73. (2) N. B. 194.

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right of property existed in the prebendary. As to the case in Peckwell, vol. ii. p. 113, that was the case of a late chapter where there could be no right by prescription in any of its members, and whether the decision be right or wrong, it is explained by the addition of a note referring to the *Hereford Case*, and shews only that where the members of a corporation hold their shares in the corporate property in severalty by agreement they are not entitled to vote. The authorities, therefore, confirm what I should have thought without them, that the prebendary holds his residentiary house in right of his prebend, as he might any living attached to it. The convenience of the matter is entirely in favour of this view, for the right of action for dilapidations depends on the principle of successive occupation. I see great difficulty in applying it to a case where there is no succession, and I think that is a strong reason for declining to act on the primâ facie presumption that the respondent occupies only as a member of the chapter, and for holding that the occupation is by the canons in succession in right of their canonry.

KEATING, J. I am of the same opinion, without at all wishing to depart from our decision in *Durant* v. *Kennett*. (1) No doubt the presumption is that when a member of a corporation aggregate occupies property for purposes connected with the corporation, he occupies it in that character, and it is for him to shew that there is a distinct occupation in his own right. The question therefore in each case is, whether the presumption is rebutted by the facts found by the revising barrister. I think the statements in this case amply rebut it, and for the reasons given by my Lord and my Brother Willes, with which I entirely concur.

BRETT, J. I for some time doubted whether the facts of the case were sufficiently stated, but, with our knowledge of the constitution of capitular bodies, I think the statements amount to this: that the respondent was entitled by prescription to be elected and installed in one of the residences belonging to the canons, in right of his canonry, and when installed I think he had a freehold interest in it, and was entitled to a vote as owner. I am glad

(1) Ante, p. 262.

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to find that the old case in Peckwell, vol. ii. p. 113, entirely supports our decision in *Durant* v. *Kennett* (1); but it is in no way contrary to our present judgment, for the ground of the decision was that the claimant was shewn to occupy his house only because he was a member of the corporation aggregate, while here the respondent occupies as a corporation sole.

Decision affirmed.

Attorney for appellant: *J. E. Fox.*
Attorney for respondent: *G. E. Philbrick.*

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May 3.

ALLEN, APPELLANT; GEDDES, TOWN CLERK OF WARRINGTON, RESPONDENT.

*Parliament—Borough Vote—Notice of Objection—Several Lists—Description of List—*6 *Vict. c.* 18, *s.* 17, *Sch. B. No.* 11.

The borough of Warrington consists of three townships, one being Warrington, each having a separate overseer, and a separate list of voters, the register being composed of the three lists. A notice of objection was signed "S. D. on the list of voters for Golborne Street in the borough of Warrington." The revising barrister found that there was only one Golborne Street in the borough, and that it was wholly in the township of Warrington; and that the description of the abode given would be commonly understood in the borough as designating the list for the township of Warrington:—

Held, that the notice was sufficient.

APPEAL from the Revising Barrister for the borough of Warrington.

A notice of objection was served upon the appellant, signed "Samuel Dunbobbin, on the list of voters for Golborne Street, in the borough of Warrington."

It was submitted for the appellant that the notice was bad, inasmuch as it did not specify the list upon which the name of the objector was to be found, and that the appellant was not called upon to prove that he was entitled to have his name retained on the register.

The borough of Warrington consists of three townships (2), each having a separate overseer, each of whom has only one list of

(1) Ante, p. 262.
(2) Namely, Warrington, Latchford, and Thelwall.

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voters to make out; and the register of voters for the borough of Warrington is composed of these three several lists.

It was contended for the appellant that the notice of objection did not comply with the form and directions given in sch. B. No. 11 of the Registration Act, 6 Vict. c. 18, not stating on which of the three lists the objector's name was to be found.

The revising barrister held the notice of objection good.

The question for the Court was whether it was necessary that the objector should state in his notice of objection on which list his name was to be found.

Jan. 21. *Holker, Q.C.* (*T. J. Barstow* with him), for the appellant. The notice was bad for not shewing upon which of the lists, there being one for each of the three townships, the objector's name appeared: *Eidsforth* v. *Farrer*. (1) The objector there was described as being "on the list of voters for the borough of L.:" the register for the borough consisted of four lists, viz. one of 10*l.* householders for each of three townships comprised in it, and one of the freemen of the borough: the objector's name was on the last-mentioned list only: and it was held that the description was insufficient, and was not cured by 6 Vict. c. 18, s. 101. A similar decision was come to in *Crowther* v. *Bradney* (2), where Erle, C.J., says: "Where there are two separate lists, the person objecting must state distinctly which of the two he is on." The notice in *Moon* v. *Andrew* (3) could not possibly mislead.

[BOVILL, C.J. In those two cases there was nothing to indicate to which of the several lists the objector referred. But it may be that the description here, though the particular township is not mentioned, is sufficient to be understood by every person in the borough.]

There is no finding here that the description would be so commonly understood.

[WILLES, J. If it was known to everybody that the whole of Golborne Street is in one of the three townships, it would be the same as if the objector had described himself as "on the list of voters for the township in which Golborne Street is situate." Would that be insufficient?]

(1) 4 C. B. 9; 1 Lut. 517.

(2) 15 C. B. (N.S.) 536, 542; 33 L. J. (C.P.) 70; H. & P. 63. (3) Law Rep. 4 C.P. 461.

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If the description is such as to exclude all possibility of doubt, it may be a compliance with the spirit of the Act. But there are no facts stated here to warrant the Court in coming to that conclusion. Primâ facie, this notice does not comply with the statute. If the description is such as would be commonly understood, it is for the objector to shew it. In *Tudball* v. *Town Clerk of Bristol* (1), the notice described the objector as "W. T., of &c., on the list of voters for the parish of Clifton:" the name of W. T. appeared on the list of freemen of the city of Bristol only, and on that list he was described as of the parish of Clifton; and yet the notice was held to be insufficient.

The respondent did not appear.

BOVILL, C.J. I do not quite understand what the question submitted to us is. If there are two streets of the same name in two different townships, or if Golborne Street is situate partly in one township and partly in another, there would be nothing in this notice to designate the particular list intended. But, if there is but one street of that name in the borough of Warrington, the whole of which street is in one township, and the description given would be commonly understood to refer to that township, the notice would be good; otherwise it would be bad. The case must go back to the revising barrister for amendment in this respect.

The case was accordingly remitted to the revising barrister, who returned it with the following additional statement:—

"There is only one Golborne Street in the borough of Warrington, and that is in the township of Warrington, and the description of the abode given would be commonly understood in the borough as designating the list for the township of Warrington."

May 3. *Holker, Q.C.* (*T. J. Barstow* with him), for the appellant. The amendment does not meet the difficulty. The place of abode of the objector was not mentioned in the notice.

[BOVILL, C.J. Reading the statement of the revising barrister with a reasonable intendment, it must be taken that he meant to refer to the list.

BRETT, J. In substance it is that the description would be

(1) 5 M. & G. 5; 1 Lut. 7.

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commonly understood to refer to those whose names appeared "on the list made in respect of qualified persons in Golborne Street."]

That would be giving the person objected to a degree of trouble which the statute intended to spare him. This can hardly be said to be a misnomer or an inaccuracy of description within 6 Vict. c. 18, s. 101.

[KEATING, J. That matter was disposed of on the former occasion. The Court merely desired to know whether the description would be commonly understood to refer to one particular list of the three.]

BOVILL, C.J. The question submitted to us in this case was virtually decided in Hilary Term. The only matter upon which the Court desired further information was, whether the description of the list on which the name of the objector appeared was such as to be commonly understood in the borough. The case having gone back to the revising barrister for the purpose of ascertaining that fact, he has returned it with a statement which is a little ambiguous. But, fairly looked at, it is quite evident that he did not mean to refer to the description of the abode given, because none at all was given, but to refer to the list upon which the name of the objector appeared. So reading the additional statement, I am of opinion that it meets the difficulty thrown out by the Court, and that the decision of the revising barrister must be affirmed.

KEATING and SMITH, JJ., concurred.

BRETT, J. The new finding of the revising barrister brings the case exactly within the principle adverted to by my Lord and my Brother Willes on the former occasion; and our judgment affirming the decision of the revising barrister is in strict accordance with the decision of this Court in *Moon* v. *Andrew*. (1)

Decision affirmed.

Attorney for appellant: *H. B. Farington, for W. Leader, Wigan.*

(1) Law Rep. 4 C. P. 461.

[END OF REGISTRATION CASES.]

GODWIN *v.* FRANCIS.

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Feb. 5.

Principal and Agent—Misrepresentation of Authority—Measure of Damages—Contract by Telegram—Statute of Frauds.

F. and four others were joint owners of an estate, which they were desirous of selling, and had advertised for sale. F., representing that he had authority from his co-owners to do so, contracted to sell the estate to the plaintiff, and sent him an abstract of title. The co-owners repudiated the contract, and concluded a sale at a higher price to another person. The plaintiff, nevertheless, conceiving that the four owners had bound themselves by the terms of the advertisement which they had issued, sued them for breach of contract, and continued his action after they had all sworn in answer to interrogatories that F. had no authority to make the contract, and was nonsuited. In an action against F. for this misrepresentation of authority:—

Held, that the proper measure of damages was: 1, the costs of investigating the title; 2, the costs incurred and paid by the plaintiff in the action against the four, down to the time when the answers to the interrogatories had been received and considered by the plaintiff's legal advisers; 3, the difference between the contract price and the market price of the estate, and that the sum for which the estate was afterwards sold, was primâ facie evidence of the latter. But that the plaintiff could not recover for the loss on the re-sale of horses, &c., bought for the purpose of stocking the land, without notice to F., and before the title had been investigated, or possession of the land given.

The plaintiff, by letter, offered to buy an estate for a given sum. The defendant answered by telegram, "Your offer for the L. estate is accepted." The instructions for the message were signed by the defendant; but the telegram received by the plaintiff merely contained the names of the sender and the receiver, written by the company's clerk in the usual printed form:—

Semble, that this was a sufficient signature by the defendant, under the Statute of Frauds, to render him liable to be charged on the contract.

THE third and only material count of the declaration stated that the defendant by warranting the plaintiff that he was authorized by certain others, to wit, George Brind, John Brind, Walter Brind, and Joseph Brind, who were interested together with the defendant, in a certain estate called the Liddington estate, to sell the same to the plaintiff for a certain price, to wit, 10,500*l.*, agreed with the plaintiff, as for himself and the others, and procured the plaintiff to agree as with himself, the defendant, and the others, that the defendant and the said others should sell to the plaintiff, and that the plaintiff should purchase from the defendant and the others the said estate, for the said sum of 10,500*l.* And the plaintiff did all things necessary on his part

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to enable him to sue the defendant for the breach thereinafter incurred; yet the defendant was not authorized by the said G. Brind, J. Brind, W. Brind, and J. Brind, to sell the estate to the plaintiff for 10,500*l.*; by means of which premises the plaintiff not only sustained [special damage as in the preceding counts mentioned] but also incurred divers expenses in proceeding against the defendant and the others for breach of the said supposed contract, before he discovered that the defendant had not such authority, and whilst he believed that the defendant had such authority, and was nonsuited in an action brought on that contract for the breach thereof against the defendant and the others, by reason and in consequence of the defendant's want of authority, and had been compelled to pay and had paid the costs of the defence to the said action, &c.

The defendant pleaded to the third count: fourthly, that he did not warrant as alleged; fifthly, denial of the agreement; sixthly, that, at the time of the alleged agreement, procuring, and warranty, he was authorized by the said G. Brind, J. Brind, W. Brind, and J. Brind, to sell the estate upon the terms alleged. Issue thereon.

The cause was tried before Lush, J., at the last summer assizes at Salisbury. The defendant, in right of his wife, was interested jointly with her four brothers, George, John, Walter, and Joseph Brind, as residuary legatees, in an estate called the Liddington estate. The owners being desirous of selling the property, an advertisement was issued, which, after a description of the estate, contained the following intimation, "To treat and view the property, applications to be made to George Brind, of, &c., or Walter Brind, of, &c.; also, to John Brind, of &c., or to Mr. Benjamin Francis (the defendant), Liddington House, Cardiff." The plaintiff, being desirous of buying the property, in September, 1867, entered into a correspondence with the defendant, and by letter of the 14th of that month made him an offer of 10,000*l.* for it. The defendant demanded 11,000*l.* On the 5th of October the plaintiff wrote again, offering to give 10,500*l.* On the 11th, the plaintiff wrote again, "I can't see the estate worth more than my offer, as the trade is gone from the mill; the repairs will be very considerable on the buildings, and the entry upon the land greatly

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to my disadvantage. As everything has been sold from it, I must be at great expense in stocking the place, as I must buy everything at a market-price for horses and all cattle." On the 13th the defendant wrote, "I will write to my co-partners in the Liddington estate for their consent to your terms;" and on the 18th he wrote again, "I have received the consent of four out of five; the other will be in Cardiff on Saturday (to-morrow), and no doubt will receive his consent also; then will write immediately." To this the plaintiff replied on the 20th, "If I am to have the Liddington estate for the price I offered, it must be settled without delay, as the season is going on for cropping the ground for wheat, and I find the entry very bad, as there is only thirty acres of wheat can be down this year." On the 22nd the plaintiff received the following telegram:—

"The following message has been received at Blandford Station, October 22nd, 1867, from Benjamin Francis, Canton, near Cardiff, to Charles Godwin, Esq., Shroton Brewery, Blandford:"—

"Your offer for the Liddington estate is accepted. Confirm yours by first post."

On the 23rd the plaintiff wrote to the defendant, "I received your telegram last night accepting my offer of 10,500*l.* for the Liddington estate, manorial rights, and rights of sporting, as mentioned in your letter with the advertisement; and I consider myself the purchaser at that sum. Please request your solicitor at once to send the necessary papers to Mr. Swyer, solicitor, Shaftesbury, to enable him to prepare the conveyance."

After some correspondence between the solicitors of the respective parties, an abstract of title was sent to the plaintiff's solicitor on the 29th of October; and on the 8th of November the plaintiff's solicitor received the following from the solicitors of the supposed vendors:—"We have seen Mr. George Brind on the subject of the sale of this estate, and to our surprise he says that he has not sold it to your client, nor authorized any one to do so, and that, if Mr. Francis has entered into any treaty with your client as to the sale of the estate, he has done so solely on his own responsibility, without being authorized by him or his co-trustee, or any member of the family. We wrote you prior to sending you abstract of title, inquiring as to the circumstances, &c., of the alleged sale to

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your client, but have received no reply. We shall, therefore, be obliged if you will explain this matter."

In reply to this, the plaintiff's solicitor on the 9th wrote,—"I received a letter from Mr. Williams, of Cardiff, stating that he was concerned for the owners of the estate, who had arranged to sell to Godwin, subject to the preparation of a formal contract, which he would prepare and send for my perusal. I wrote in reply to Mr. Williams, telling him that the letters which had passed between his clients and mine amounted to a binding agreement, and that there seemed to be no necessity for a further contract being prepared; but that, if he thought it desirable to have a more formal contract, it should contain a stipulation as to the purchaser's having immediate possession; and I at the same time requested him to send me the abstract at once, as Godwin wished to complete as soon as possible. A day or two afterwards, I received the abstract from you: and this is all I know of the matter."

On the 18th the solicitors for Mr. George Brind again wrote to the plaintiff's solicitor intimating that, whatever might have been the impression of Francis, it was clear that neither the trustees nor the other residuary legatees had given him any authority to sell the estate. On the 28th the defendant himself wrote to the plaintiff:—"I am sorry there should have been any misunderstanding in the matter of the sale of the Liddington estate. I thought that, subject to the preparation of a proper contract, I was authorized to sell; but it now appears that other parties interested take a different view of the matter."

The contract thereupon was not carried out. The estate was afterwards sold to another person for 10,700*l.* The plaintiff thereupon sued the joint owners of the estate for the alleged breach of contract. In answer to interrogatories administered by the plaintiff, the joint owners all swore that the defendant had no authority from them to sell the estate, though they admitted that they had sanctioned the advertisement; and the defendant himself stated that, though he had no express authority from all, he was under the impression that they would all concur in a sale provided the sum of 10,500*l.* could be obtained. The plaintiff continued the action, contending that the owners were bound under the

terms of their advertisement, and was nonsuited. (1) He then brought this action to recover damages from the defendant for his

(1) GODWIN *v.* BRIND AND OTHERS.

Principal and Agent—Authority of Agent.

One F. and four other persons who were jointly interested in an estate offered it for sale by an advertisement which intimated that, "to treat and view," applications were to be made to (among others) F.:—

Held, that this was not holding out F. as a person authorized to enter into a contract to sell the property.

Nov. 4, 1868. Action for breach of a contract for the sale of an estate, tried before Mellor, J., at the Salisbury summer assizes, 1868. It appeared that the defendants, George Brind, Walter Brind, John Brind, Joseph Brind, and Benjamin Francis, were jointly interested in an estate called the Liddington estate, near Cardiff; and that, in September, 1867, the plaintiff's attention being drawn to an advertisement offering the estate for sale, and intimating that applications "to treat and view" were to be made to certain persons named, and amongst them to "Benjamin Francis, Esq., Liddington House, Cardiff," he put himself in communication with Mr. Francis, and ultimately agreed with him to become the purchaser of the estate for 10,500*l.*; but that the other four persons interested repudiated the authority of Francis to make the contract, though it was admitted that they authorized the issuing of the advertisement.

The learned judge nonsuited the plaintiff, on the ground that the advertisement gave Francis no authority to bind his co-proprietors by his contract for the sale of the estate.

H. T. Cole, Q.C., in Michaelmas Term, 1868, moved for a new trial, on the ground of misdirection. He submitted that the advertisement referring intending purchasers to Francis "to treat," made him the agent of all the owners of the estate to bind them by any contract which he might in consequence enter into on their behalf; referring to Webster's Dictionary, according to which the verb "to treat" means, "to negotiate, to settle, to come to terms of accommodation."

BOVILL, C.J. I am of opinion that my Brother Mellor was right in the construction which he put upon the advertisement, and that there should be no rule. The estate which was offered for sale belonged to five joint owners, and they caused an advertisement informing persons who might be desirous of purchasing it that applications "to treat and view" were to be made to certain persons described, one of whom was Francis. This undoubtedly gave Francis authority to enter into negotiations and to receive proposals on behalf of his co-owners and himself, but it gave him no authority to enter into a contract for the sale of the estate.

BYLES, J. I am of the same opinion. The word "treat" receives light from the word "view," with which it is associated. Who is to view? Not the seller of the estate. It is clear, therefore, that the language of the advertisement gave Francis no further authority than to receive proposals, not to make a contract which should bind those who were jointly interested with him in the property.

KEATING and BRETT, JJ., concurred.

Rule refused.

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misrepresentation of authority to sell, claiming the following items of damage:—27*l.* 11*s.* 6*d.* for his costs of investigating the title; 200*l.* for the loss of the bargain; 86*l.* 13*s.*, the costs which he was compelled to pay to George, Walter, and John Brind in the former action; 87*l.* 1*s.*, the costs paid on the same occasion to Joseph Brind; 64*l.* 1*s.*, the costs of Francis; 161*l.* 4*s.*, the plaintiff's own costs of that action; and 100*l.* for loss on the re-sale of stock: in all, 726*l.* 10*s.* 6*d.*

A verdict was taken for the plaintiff, subject to a question reserved as to whether the telegram was a sufficient contract in writing to satisfy the Statute of Frauds, and also subject to a motion to reduce the damages to such sum as the Court should think fit, the Court to be at liberty to draw inferences of fact.

Nov. 5, 1869. *Lopes, Q.C.* (*C. Bowen* with him), moved to enter a nonsuit or a verdict for the defendant, on the ground that there was no such contract in writing as would have supported an action against the five if Francis had acted with the authority of his co-owners; or to reduce the damages as agreed at the trial. This being an action against an agent for falsely representing himself to be authorized to make the contract for the sale of the estate, it was incumbent on the plaintiff to prove a contract, such as would have bound the principals if the agent had had the authority he represented himself to have. The only evidence of a contract such as is alleged in the declaration was, the telegram of the 22nd of November, 1867. That was signed by the telegraph company's clerk, who was not the defendant's agent for that purpose. Nor, in fact, can an agent delegate to a third person his authority to contract. Consequently, there was no sufficient contract here to satisfy the Statute of Frauds.

[BOVILL, C.J. In the case of an auctioneer and his clerk, the auctioneer is agent for the purchaser and receives the name, and the clerk usually writes it down. That has been over and over again held to be a sufficient signature to satisfy the statute.]

In *Pitts* v. *Beckett* (1), it was doubted whether a machine-copy of a contract in a broker's book would be a sufficient writing within

(1) 13 M. & W. 743.

the statute. The note which was signed by Francis and sent to the telegraph office, though in court, was not put in evidence, and if it had been it would not have availed, because the defendant signed it as instructions to the telegraph clerk. He did not add his signature as part of the message to be sent, or with the intention of binding himself to the contract.

[BOVILL, C.J. This point does not appear from the learned judge's notes to have been taken at the trial. If it had been, the difficulty, if there be a difficulty from the message signed by the defendant not having been put in, might have been obviated.]

As to the damages, it is clear that, as to some of the items at least, the plaintiff is not entitled to recover.

BOVILL, C. J. The rule may go, as to the reduction of damages. But, on the first point, I think there should be no rule. The action, so far as this matter is concerned, is for breach of a warranty by the defendant that he had authority to contract for the sale of an estate. The allegation is that the defendant, by warranting the plaintiff that he was authorized by certain others, to wit, &c., who were interested together with the defendant in a certain estate, to sell the same to the plaintiff for 10,500*l.*, agreed with the plaintiff, as for himself and the others, and procured the plaintiff to agree as with himself, the defendant, and the others, that the defendant and the others should sell to the plaintiff, and that the plaintiff should purchase from the defendant and the others the said estate for 10,500*l.* The objection raised is, that there was no evidence of any agreement in writing by the defendant as for himself and the others to sell the estate to the plaintiff; and the question is whether the defendant did profess to sell as for himself and the others, and whether there is a sufficient agreement to that effect to satisfy the Statute of Frauds. Now, it must be taken that all the materials were before the jury for the purpose of raising the point; amongst others, we must assume that the telegram was put in. The instructions for the telegram, accepting the terms proposed by the plaintiff's letter of the 5th of October, 1867, were signed by the defendant. It was contended that that was not a signature of the contract, the paper so signed being mere instructions to the telegraph clerk. Assuming that argument to be correct (though I am not prepared to adopt it), that would be instruc-

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tions to the company to do that which in the ordinary course of their business is done. Now, the ordinary course of business is to transmit, to write out, an exact copy of that which is intended to be conveyed, and to forward it. The acceptance of the plaintiff's offer is in the body of the document. The telegraph clerk copies it, signs it, and sends it to the plaintiff, the name of the seller appearing thereon. A correspondence ensues between the parties on the footing that there had been a binding contract for the sale of the estate; and, if the defendant had authority, it is clear that what was done did constitute a binding contract. But, independently of that, I am prepared to hold that the mere telegram written out and signed in the way indicated by the telegraph clerk, if done with the authority of the vendors, would have been a sufficient signature within the Statute of Frauds. It is not, however, necessary absolutely to determine that, because we have the subsequent correspondence, which passed on the footing of the letter, and the telegram constituting a binding contract.

WILLES, J. I am of the same opinion. It must be taken for all practical purposes that the message signed by the defendant and sent to the office, and the telegram which was forwarded, were both put in. It would have been idle to take the objection in any other form, because the subsequent correspondence shewed that the telegram was received by the plaintiff; and the paper was in Court. The 46th section of the Common Law Procedure Act, 1854, was expressly intended to prevent a slip of this kind from being taken advantage of, and to render it unnecessary to send a cause down for a new trial merely on the ground that some document had not been formally put in. Assuming, then, that the two documents are before us, the question is whether there would have been a sufficient contract in writing to satisfy the Statute of Frauds, provided the defendant had the authority he assumed to have. The complaint is that he had no authority; and it does not lie in his mouth to say that he had not the authority which he professed to act upon. The terms of the message are sufficiently set out and defined in the correspondence which subsequently took place. By it the defendant professed to bind himself and the other persons interested jointly with him, to accept the plaintiff's offer. The message was left, signed by the defendant, at the office of the

Telegraph Company. A copy was sent by the company to the plaintiff, and authenticated by them in the usual way. If the message so sent had been contained in a letter sent by post, there can be no doubt that would have been a sufficient contract to satisfy the statute. That is because the General Post Office has been held to be the common agent of the parties employing it. For that reason it is that a notice of dishonour of a bill of exchange may be transmitted through the post. That reasoning does not apply to the same extent to the Electric Telegraph Company. I merely mention it to shew why, under the circumstances of this case, the telegram communicated by the Telegraph Company, the common agent of the parties, may be taken in conjunction with the correspondence between them to constitute such a contract in writing as will satisfy the Statute of Frauds.

BRETT, J. It being agreed that we are to assume that both the instructions for the telegram and the telegram itself were put in, I think there is abundant evidence that the defendant entered into such a contract as would have bound himself and the other persons for whom he professed to act, if he had had authority from them to make the contract. It has been contended that the signature of the defendant to the instructions for the telegram did not amount to a signature to the acceptance of the contract. But I think there is evidence that the defendant, when he signed the instructions, intended that to operate as his signature to the contract, and that it constituted a binding contract signed by him, if he had authority to enter into it. Then, it was objected that the defendant's name appearing on the paper received by the plaintiff was insufficient, because the defendant had no power to delegate to the telegraph clerk an authority to sign his name. I think, however, it must be assumed as against him that he had authority to delegate to the clerk the power to sign for him, and that the signature so placed was binding upon him. In either point of view, therefore, there was a sufficient signature to bind the principals if the defendant had authority to enter into the contract on their behalf. (1)

(1) A proposal in writing, signed by the party to be charged, and accepted by parol, is a sufficient memorandum within the Statute of Frauds: *Reuss* v. *Picksley*, Law Rep. 1 Ex. 342.

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Jan. 15; Feb. 5. *H. T. Cole, Q.C.* (*Ledgard* with him), shewed cause. The plaintiff is clearly entitled to recover the costs of investigating the title; it is quite novel to dispute that. Then, secondly, as to the costs of the former action, the defendant having represented that he had authority to contract with the plaintiff for his co-owners, the plaintiff was justified in commencing an action against all the parties; it was the natural and proximate consequence of the representation which the defendant made: *Collen* v. *Wright* (1); *Richardson* v. *Dunn* (2); and notes to *Thompson* v. *Davenport*. (3) The defendant's letter of the 28th of November did not expressly state that he had acted without authority; and the plaintiff was clearly justified, as a reasonable man, in proceeding with the action notwithstanding. Even after he had received the answers to the interrogatories he had administered to the defendants, there was some ground to consider that they were acting in collusion with one another, being near relatives; and the plaintiff was entitled to proceed with the action to satisfy himself that this was not the case: *Spedding* v. *Nevell*. (4) Thirdly, the plaintiff is entitled to the increased value of the estate; this appears clearly from *Engell* v. *Fitch* (5), in which the distinction is pointed out between cases in which the contract goes off for want of title, and cases in which the contract is voluntarily broken by the defendant, the rule that the plaintiff should not recover damages for loss of bargain applying only to the former. Fourthly, with respect to the loss on the purchase of stock, the plaintiff had given notice to the defendant that he should require to make such purchases, and he is entitled to recover, therefore, the loss that he has sustained.

Lopes, Q.C. (*C. Bowen* with him), in support of the rule. It must be admitted that the defendant is liable for the costs of investigating the title. With respect to the costs of the preceding action, it is clear from *Spedding* v. *Nevell* (4), that the plaintiff ought not to have proceeded with it after he had received the answers on oath to the interrogatories; and that he cannot recover, therefore, any

(1) 7 E. & B. 301; 27 L. J. (Q.B.) 215.

(2) 8 C. B. (N. S.) 655; 30 L. J. (C.P.) 44.

(3) 2 Sm. L. C. 6th ed. 340.

(4) Law Rep. 4 C. P. 212.

(5) Law Rep. 3 Q. B. 314; in error, Law Rep. 4 Q. B. 659.

subsequent expenses; but further, before he commenced the action he had received the defendant's letter of the 28th of November, and was thereby put upon his guard, and he ought not, therefore, to have commenced the action without at any rate having first communicated with the defendant, and inquired whether he still considered he had had authority from his co-owners; if the plaintiff acted rashly in bringing the action he is not entitled to recover his costs. Thirdly, with respect to the loss of bargain, the cases are not quite consistent, the distinction between *Flureau* v. *Thornhill* (1), and *Hopkins* v. *Grazebrook* (2), has been differently explained in *Sikes* v. *Wild* (3) and *Engell* v. *Fitch.* (4) In the former it seems to have been held that the defendant will only be liable for damages for loss of bargain when he has been guilty of misconduct, and the defendant in this case is not accused of having acted improperly. It is clear that the agent who is sued in this form of action cannot be liable for greater damages than the principal would have been if the contract had been binding and he then had broken it. Fourthly, with respect to the purchase of stock, the plaintiff nowhere stated in his letters that he was going to purchase stock before the contract was completed and he had obtained possession of the land, and as he did purchase, it was at his own risk.

BOVILL, C.J. The right of the plaintiff to recover his costs of investigating the title being admitted, three points only remain for our consideration; the first relates to the costs of the action brought by the plaintiff against the alleged vendors, which failed on the ground that the present defendant had no authority from them to sell, and the plaintiff was nonsuited and had to pay his own costs and those of the defendants. It seems to me that the present defendant, having entered into the contract, led the plaintiff to believe that he had authority to do so, and that there was an implied engagement on his part that he had such authority: the plaintiff was fully justified in acting on this implied representation, and commencing proceedings against the vendors, and the defend-

(1) 2 W. Bl. 1078.
(2) 6 B. & C. 31.
(3) 4 B. & S. 421; 32 L. J. (Q.B.) 375.
(4) Law Rep. 3 Q. B. 314; in error, Law Rep. 4 Q. B. 659.

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ant must pay all such costs as have been reasonably incurred by the plaintiff by acting on this representation. It would be for the jury to say what costs have been so reasonably incurred: *Hughes* v. *Graeme* (1); and we have now to decide this upon the evidence in their place, and I am clearly of opinion, as I have said, that the action was reasonably and properly commenced. The plaintiff was entitled, at least, to the distinct denial by the defendant himself of his authority before he gave up his claim to the estate, and I find no such denial either in the defendant's letter of the 28th of November or elsewhere.

The question, then, is whether the action ought to have been continued after certain interrogatories had been answered; it seems to me, that after the plaintiff had obtained distinct denials on oath from all the vendors, including the defendant, that the latter had authority to make the contract, he ought to have discontinued his proceedings; instead of that, he determined to go on with them, relying on another ground, viz., the advertisements which had been issued with the vendor's authority. He failed in his subsequent proceedings, because he acted on a wrong view of the law, and not because he was mistaken in respect of the authority in fact given by the vendors to the defendant. I think, therefore, that the plaintiff is not entitled to recover any costs incurred after the interrogatories had been answered and the answers had been considered by the plaintiff's legal advisers.

The next point is, whether the plaintiff is entitled to recover damages arising from the loss of bargain; and it was put that the price at which the estate was re-sold must be treated as its market price in the absence of evidence to the contrary.

The case seems to me to turn on whether these damages could have been recovered from the vendors if the defendant had had authority from them, and they had refused to fulfil their contract, and we must assume that they would have been able to make a good title if they had chosen to do so. I am not aware of any decision in which it has been held, that where a man having a good title refuses to convey according to contract, he is not liable to compensate the other party for the loss of his bargain as well as for any expenses he may have actually incurred; the contrary

(1) 33 L. J. (Q.B.) 335.

is laid down in *Engell* v. *Fitch* (1), and I do not see that *Sikes* v. *Wild* (2) is inconsistent with it, for in that case there was a failure of title. I think, therefore, that the defendant is liable for the difference between the contract price and the market value of the estate, and that the price at which it was re-sold is primâ facie evidence of its market value.

With respect to the last item of damages, viz., that respecting the stock purchased by the plaintiff, it seems to me that this did not naturally flow from the breach of contract; it has not been shewn to my satisfaction that the purchase of stock was distinctly contemplated by the parties at the time the contract was made, and I do not think, therefore, that the plaintiff was entitled to recover under this head.

MONTAGUE SMITH, J. I am of the same opinion. The first question is, whether the plaintiff is entitled to all or any of the costs of the former action. That depends on what was the reasonable course for him to pursue in the position in which he was placed by the defendant. There can be no doubt there was at first much to make him think that the defendant had authority to sell the estate, and expenses had been actually incurred in investigating the title; in the course of that investigation one of the vendors wrote and said that he had not given any authority to the defendant, and the defendant himself wrote what was at most an equivocal letter, saying that his co-owners denied his authority. Now the plaintiff had a valuable contract, and he was not bound to sit down without it and do nothing; he was no doubt in a position of difficulty, and I am not at all prepared to say he did not follow a reasonable course in bringing the action he did. He may well have supposed that the authority of the agent, which often involves questions of law as well as of fact, could be proved notwithstanding those letters, and the plaintiff, therefore, it seems to me, took the natural and not imprudent course in commencing the action; when, however, he had interrogated the vendors, and all of them denied the defendant's authority, there was no room to doubt what the evidence at the trial would be, and the further prosecution of

(1) Law Rep. 3 Q. B. 314; in error, Law Rep. 4 Q. B. 659.

(2) 4 B. & S. 421; 32 L. J. (Q.B.) 375.

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the action then became imprudent, and therefore the costs beyond that time, according to the ordinary rules, cannot be recovered in this action; the costs recovered by the plaintiff should include any that were incurred in laying the answers before counsel for their consideration. Secondly, as to the defendant's right to recover as damages the difference between the marketable value of the estate and what he had contracted to give for it; to this I think he is clearly entitled: he is entitled to what will recoup him for what he has lost by the contract not being fulfilled. The result of the decision in *Engell* v. *Fitch* (1) is thus stated by Kelly, C.B.: "I may add, that we think that this would be so in all cases of this kind, excepting those within the rule of *Flureau* v. *Thornhill* (2), which is confined to the single case of failure of title." If it had been shewn that the vendors were insolvent, it might have raised different considerations: but there is nothing of that kind here, and there is nothing to shew that the plaintiff would not have recovered these damages from the vendors if the defendant had had authority from them and they had refused to complete. On the third head I agree with my Lord, that the plaintiff is not entitled to succeed; supposing nothing had passed between the plaintiff and defendant on the subject of stocking the farms, these damages would clearly have been too remote, for it could not be said to have been in the contemplation of the parties that such purchase should be made at any rate before the contract had been carried out. The correspondence relied on shews the plaintiff was about to purchase stock; but I am not at all satisfied it could be gathered from the letters that the plaintiff intended to do so before he got possession of the farms.

BRETT, J. I am of the same opinion with respect to the costs of the former action. I think the plaintiff is entitled to recover them up to the time that the answers to the interrogatories were received, and a reasonable time after for their consideration, but not beyond. It is not necessary to decide whether the distinct denial by the defendant that he had authority, with no other evidence, would have made it unreasonable for the plaintiff to proceed, for his letter of the 28th of November clearly contains no such denial.

(1) Law Rep. 4 Q. B. at p. 665. (2) 2 W. Bl. 1078.

After the interrogatories had been answered I think the plaintiff's case was hopeless, and he ought not to have gone on. Then, as to the increased value of the property, I think the plaintiff would have been entitled to recover from the vendors, if the defendant had had the authority he warranted, the estate with its increased value; and if they had refused to convey, he could have recovered the damages now claimed against them, and he is therefore entitled to recover them from the defendant. Then, thirdly, with respect to the plaintiff's loss in respect of the purchase of stock, I think the plaint ff is not entitled to recover. It was purchased before the possession of the property had been given to him, or the title investigated; and I do not think the defendant was bound to expect the plaintiff would have so purchased it, or that the correspondence amounted to notice to the defendant of the plaintiff's intention to do so.

Rule absolute to reduce the damages to 227*l.* 11*s.* 6*d.* (*being* 200*l. for loss of bargain, and* 27*l.* 11*s.* 6*d. costs of investigating title*), *and the costs of the former action incurred up to the time when the defendants' answers to the interrogatories administered to them by the plaintiff had been considered by the plaintiff's counsel.*

Attorneys for plaintiff: *Venning, Robins, & Co., for Swyer, of Shaftesbury.*

Attorney for defendant: *C. T. Foster, for R. W. Williams, Cardiff.*

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Feb. 7.

[IN THE EXCHEQUER CHAMBER.]

ROBERTS *v.* THE BURY IMPROVEMENT COMMISSIONERS.

Building Contract, Construction of—Certificate of Architect—Party taking advantage of his own wrong.

66 L.J. 121-2
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9 Ex 171
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11 QBD 230
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The plaintiff contracted to erect buildings for the defendants according to certain plans and drawings, the whole to be completed for a given sum by a day named. By clause 3 of the contract, additions or alterations were not to invalidate the contract, but were to be added to or deducted from the contract-price as the architect should consider just. By clause 4 the architect was to be at liberty to give fresh drawings and so to vary the mode in which the work was to be done. By clause 24 it was provided that, if by reason of additions, &c., or in consequence of inclemency of weather, or for want or alleged deficiency of any orders, drawings, or directions, &c., the contractor should in the opinion of the architect have been unduly delayed or impeded in the completion of the contract, the architect might grant an extension of time for the completion. By clause 27 it was provided that, in case the contractor should fail in the due performance of any part of the contract, or should become bankrupt, &c., or should not, in the opinion and according to the determination of the architect, exercise due diligence and make such due progress as would enable the works to be effectually and efficiently completed at the time stipulated, the defendants might determine the contract by notice, and take possession of the works, plant, and materials, and use or sell them, &c.; and in that event the architect was by clause 28 to determine what, if anything, should be paid to the plaintiff. By clause 29 a penalty was imposed on the plaintiff for any default: and by clause 34 all differences were to be referred to the architect, whose decision was to be final, without giving any reasons.

In an action against the defendants for preventing the plaintiff from performing the contract, they pleaded, thirdly, that the plaintiff failed in the due performance of certain parts of the work, and did not in the opinion of the architect exercise due diligence and make such due progress as provided by clause 27, and as would have enabled the works to be efficiently and effectually completed at the time agreed, and that they gave the plaintiff a notice under that clause that they determined the contract, and took possession of the works, &c.

To this plea the plaintiff replied,—

2. That the alleged failure and non-exercise of due diligence by the plaintiff were caused by the default of the defendants and the architect in supplying plans and drawings and in setting out the land and defining the roads and giving such particulars as would enable the plaintiff to commence the works.

3. That the alleged failure, &c., of the plaintiff were wholly caused by reason of matters and things provided for in clause 24, by reason whereof the plaintiff was in fact, and in the opinion of the architect, unduly delayed and impeded in the completion of the contract; that all conditions were fulfilled, &c., to entitle the plaintiff to have an extension of the time; but that the architect failed and neglected to grant such extension.

4. A similar replication to the third, leaving out the words "and in the opinion of the architect."

To the second replication, the defendants rejoined,—

1. That the non-exercise by the plaintiff of such due diligence, and the not making by the plaintiff of such due progress, were not in the opinion and according to the determination of the architect caused by the acts or defaults of the defendants or their architect, or by breaches of contract by the defendants.

2. The like, and further that the opinion and determination of the architect were formed and arrived at upon and after due and reasonable consideration of the facts.

Upon demurrer, the Court of Common Pleas held all the replications to be bad in substance, and the rejoinders to be good in substance,—on the ground that, the parties having constituted the architect the sole judge, his certificate justified the defendants in putting an end to the contract.

The majority of the Court of Exchequer Chamber, (Kelly, CB., Channell, B., Blackburn and Mellor, JJ.) agreeing with the Court below that the third and fourth replications were bad, reversed their decision,—holding the second replication to be good in substance, and the two rejoinders thereto bad; for that—it being admitted on the record that the alleged failure of the plaintiff to use such due diligence and to make such due progress as to enable him to complete the works by the day specified were caused by the failure of the defendants and the architect to supply plans and set out the roads necessary to enable the plaintiff to commence the works; and clause 27 not conferring a power upon the architect to determine, and to bind the plaintiff by his determination, that the defendants had not by their own wrongful act or default prevented the plaintiff from proceeding with the works, although they had in fact so prevented him,—the rule of law applied, which exonerates one of two contracting parties from the performance of a contract, where the performance of it is prevented or rendered impossible by the wrongful act of the other contracting party.

Cleasby and Pigott, BB., dissented, holding that the architect having been constituted the final judge of the matter, his certificate justified the defendants in putting an end to the contract, under clause 27.

ERROR upon a judgment of the Court of Common Pleas in favour of the defendants upon demurrers. (1)

This was an action to recover damages which the plaintiff had sustained by reason of the defendants having prevented him from completing a building contract which he had entered into with them.

The first count of the declaration stated that, after the passing of the Bury Improvement Act, 1846 (9 & 10 Vict. c. ccxciii.), and the 20 & 21 Vict. c. 81, and after the defendants had been duly constituted a burial board, a certain contract was entered into between the plaintiff and the defendants. It then set out the

(1) Law Rep. 4 C. P. 755.

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contract, and averred the performance of all conditions precedent, and that the defendants before the time for the completion of the contract by the plaintiff, wholly and finally and wrongfully refused to permit the plaintiff to complete the same, and wholly and finally and wrongfully prevented and discharged the plaintiff from completing the same, and renounced the contract on their part; whereby the plaintiff was deprived of profits, &c.

The material conditions of the contract were the following:—

3. "That no additions, deductions, alterations, or deviations made or permitted in, to, or from the construction of the said buildings or any of them, shall annul or invalidate the contract; but the value of the same, if any, shall be ascertained and be added to or deducted from the amount of the contract, as the case may require, by and according to the judgment of and the admeasurements and valuations to be made by the architect, and shall have regard, amongst other considerations, to any deficiency in the quantity, quality, or disposition of the materials or labour employed in or about any such additions, alterations, or deviations respectively, or in or about any other of the works mentioned or referred to in the contract, for which purpose any defect or inferiority in the quality, quantity, or disposition of the materials or labour employed shall be held and deemed a deviation from the work intended by the contract, and shall be made the subject of such allowance in respect of the defect or inferiority of the quantity, quality, or disposition of the materials and labour so employed, as the architect shall consider just and equitable."

4. "That the architect shall have full power and authority from time to time and at all times to make and issue such further drawings and to give such further instructions and directions as may appear to him necessary or proper for the guidance of the contractor and the good and sufficient execution of the works according to the terms of this specification; and the contractor shall receive, execute, and obey and be bound by the same according to the true intent and meaning thereof, and as fully and effectually as though they had accompanied or had been mentioned or referred to in the specification; and he (the architect) may also alter or vary the levels or position of any of the buildings contemplated by this specification, or order any further and other works and buildings not contemplated by this specification or the contract, or may order any of the buildings contemplated thereby to be omitted, or may order any work or any portion of works executed or partially executed to be removed, changed, or altered, and, if needful, that other work shall be substituted instead thereof," &c.

24. "Provided always that if, by reason of any additions to or enlargements of the works (which additions or enlargements the architect is hereby authorized to make), or for any other just cause arising with the burial board or the architect, or in consequence of any unusual inclemency of weather, or for want or for alleged want or deficiency of any orders, drawings, or directions, or by reason of any difficulties, &c., or differences whatsoever and howsoever occasioned, the contractor shall in the opinion of the architect have been unduly delayed or impeded in the completion of his contract, it shall be lawful for the architect to grant from time to time, by writing under his hand, such extension of time, and to assign such

other day or days for completion, as to him may seem reasonable, without thereby prejudicing or in any manner affecting the validity of the contract or the sufficiency in the tender; and any and every such extension of time shall be deemed to be in full compensation and satisfaction for or in respect of any and every actual and probable loss or injury sustained or sustainable by the contractor in the premises, and shall in like manner exonerate him from any claim or demand on the part of the burial board for or in respect of the delay occasioned by the cause or causes in respect of which any and every such extension of time shall have been made, but not further or otherwise, or for or in respect of any delay continued beyond the time mentioned in such writing or writings respectively."

27. "That it shall be lawful for the burial board, in case the contractor shall fail in the due performance of any part of his undertaking, or shall become bankrupt or insolvent, or shall compound with his creditors or propose any composition to his creditors for the settlement of their debts, or shall carry on or propose to carry on his business under inspectors on behalf of his creditors, or shall commit any act of bankruptcy, or shall not in the opinion and according to the determination of the architect exercise due diligence and make such due progress as would enable the works to be effectually and efficiently completed at the time and in the manner aforesaid, to determine the contract by a notice in writing under the hand of the clerk of the burial board, and to enter upon and take possession of the said works, and of the plant, tools, and materials of the contractor, and use or sell or use and sell the same as the absolute property of the burial board."

28. "That, in case of the contract being so determined," the board "may engage workmen and provide materials," &c., in such manner as the architect may think necessary and proper for completing the works, &c., and the architect "shall fix and determine what amount, if any, is then reasonably earned by the contractor in respect to work actually done, and in respect of the value of any materials, &c., provided by the contractor and taken to by the board," &c.

29. "That, in case the contractor shall fail in the due performance of his contract by and at the times hereinbefore mentioned or referred to (or at other the day or days to which the period of completion may have been extended), he shall be liable to pay to the burial board, as and for liquidated damages, the sum of 1*l.* per cent. on the amount of the accepted tender, for each and every week which may elapse between the appointed and actual time of completion and delivery hereinbefore mentioned or provided for, or the burial board may deduct the same from any moneys in their hands due or to become due to the contractor."

34. "That, in case of any doubts, disputes, or differences arising or happening touching or concerning the erections and buildings, or any of them, or relating to the quantities, &c., of work done or to be done by the contractor, &c., such doubts, disputes, &c., shall be referred to the architect; and the architect shall not be required or be compellable to answer or explain any matter touching or relating to any certificate or award made by him, or to state or shew how or why or in what manner or on what grounds he settled or determined, or omitted to settle or determine, any matter whatsoever, nor shall be required or be compellable in any way to state his reasons for any proceedings he may take or direct to be taken in or about the premises," &c.

36. "If the works are let in one contract, the whole to be completed on or before the 2nd of October, 1868."

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Third plea,—that the plaintiff failed in the due performance of certain parts of his undertaking, and did not, in the opinion and according to the determination of the said architect, and within the meaning of the agreement, exercise due diligence and make such due progress as provided in and by the 27th clause above mentioned, and as would have enabled the said works to be effectually and efficiently completed at the time and in the manner by the agreement provided; that all things happened, &c., to entitle the defendants under and according to the provisions of the agreement to give the notice and proceed in the manner thereinafter mentioned; that thereupon the defendants served upon the plaintiff a notice (setting out a notice that the defendants availed themselves of the 27th condition to determine the contract, and take possession of the works, plant, tools, and materials of the plaintiff); and that they thereupon accordingly determined the said contract, and took possession of the said works and of the plant, tools, and materials of the plaintiff, as by the 27th clause provided, &c.

Second replication to the third plea,—that the architect did not at any time grant an extension of time for the performance and completion of the contract; and that the alleged failure of the plaintiff in that plea mentioned, and the non-exercise by the plaintiff of such due diligence as therein mentioned, and the not making by the plaintiff of such due progress as therein mentioned, were caused and occasioned by the delay and default of the defendants and the architect in supplying plans and drawings, and delay and default of the defendants and their architect in setting out the land and defining the roads and giving such particulars as would enable the contractor to commence the specified works, and not otherwise.

Third replication to the third plea,—that the alleged failure by the plaintiff in the third plea mentioned, and the non-exercise by the plaintiff of such due progress as therein alleged, were wholly caused and occasioned by reason of causes, matters, and things provided for in and by the 24th clause, by reason whereof he (the plaintiff) was in fact and in the opinion of the architect unduly delayed and impeded in the completion of the contract; and that all conditions were performed and all things existed and happened, and all times elapsed, to entitle him the plaintiff to have granted to him by the architect an extension of time, and to have another

day assigned for completion of the contract; nevertheless the architect wholly failed and neglected to grant any extension of time whatever to the plaintiff, or to assign any other day or days whatever for the completion of the contract by the plaintiff.

Fourth replication to the third plea,—the plaintiff repeats the several statements in the third replication mentioned, with the exception of the words "and in the opinion of the said architect."

Second rejoinder to the second replication to the third plea,—that the non-exercise by the plaintiff of such due diligence as therein mentioned, and the not making by the plaintiff of such due progress as therein mentioned, were not in the opinion and according to the determination of the architect caused and occasioned by the acts and orders, or by the neglects, defaults, and hindrances of the defendants or their architect, or by breaches of the contract by the defendants.

Third rejoinder to the second replication to the third plea,—the defendants repeat the statements in the next preceding rejoinder mentioned, and further say that the said opinion and determination of the architect were formed and arrived at upon and after due, reasonable, proper, and bonâ fide consideration of the facts and circumstances relating to such failure and non-exercise of due diligence.

The defendants demurred to the second, third, and fourth replications to the third plea; and the plaintiff demurred to the second and third rejoinders to the second replication. Joinders.

Upon the argument of the demurrers, the Court of Common Pleas held (1) that, notwithstanding the absence of due diligence on the contractor's part in proceeding with the works might have been occasioned by the default of the defendants themselves or their architect, yet the defendants were entitled, under the 27th condition, to determine the contract upon the certificate of the architect.

The plaintiff thereupon brought error.

The case was argued in the Exchequer Chamber at the sittings in error after Michaelmas Term last, by *Manisty, Q.C.* (*R. G. Williams* with him), for the plaintiff, and by *Holker, Q.C.* (*C.*

(1) Law Rep. 4 C. P. 755.

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Russell with him), for the defendants. The following authorities were cited:—

For the plaintiff,—*Holme* v. *Guppy* (1), *Russell* v. *Da Bandeira* (2), and *Westwood* v. *Secretary of State for India.* (3)

For the defendants,—*Scott* v. *Liverpool Corporation* (4), *Stadhard* v. *Lee* (5), *Milner* v. *Field* (6), and *Clarke* v. *Watson.* (7)

Cur. adv. vult.

The learned Judges differing in opinion, CLEASBY, B., delivered the judgment of Pigott, B., and himself:—

This is an action to recover damages which the plaintiff alleges he has sustained by reason of the defendants' preventing him from completing a contract which he had entered into with them for erecting certain boundary walls and other buildings.

The declaration, after setting out the contract, alleges that the plaintiff had performed all conditions to entitle him to complete the contract, but that the defendants wrongfully prevented him from completing the same, and renounced the contract on their part.

The defendants by their third plea justify having done so, under a clause in the specification (which forms part of the contract), by which they are entitled to determine the contract by notice in writing, and to enter and take possession of the plant, &c., in case the plaintiff shall not, in the opinion and according to the determination of the architect, exercise due diligence and make such due progress as will enable the works to be completed efficiently and effectually within the time agreed. The plea then alleges that, according to the determination of the architect, the plaintiff did not exercise due diligence and make such due progress, and, after setting out the notice in writing, justifies the act complained of.

To this plea there are several replications. The second replication alleges that the architect had not granted any extension of time for the completion of the contract, and that the alleged failure of the plaintiff to make due progress was caused and occasioned by the delay and default of the defendants and the architect

(1) 3 M. & W. 387.
(2) 13 C. B. (N.S.) 149; 32 L. J. (C.P.) 68. 9 Jur N.S. 718
(3) 7 L. T. (N.S.) 736.
(4) 1 Giff. 216; 27 L. J. (Ch.) 641. 4 Jur N.S. 402.
(5) 3 B. & S. 364; 32 L. J. (Q.B.) 75. 9 Jur N.S 908
(6) 5 Ex. 829; 20 L. J. (Ex.) 68.
(7) 18 C. B. (N.S.) 278; 34 L. J. (C.P.) 148.

in supplying plans and drawings and in setting out the lands and defining the roads, and in giving instructions so as to enable the plaintiff to commence the works, and not otherwise.

There is a demurrer to this replication, upon which the principal question arises: but there are also two rejoinders to it, which are also demurred to. The effect of both is, that, according to the opinion and determination of the architect, the undue delay of the plaintiff was not caused by the acts or defaults of the defendants.

The question which arises upon the pleadings is, whether it is a good answer to a plea, setting up the authority of the defendants to put an end to the contract upon the determination of the architect that the plaintiff is not exercising due diligence and making such due progress as will enable the works to be completed efficiently by the time agreed, to reply that the defendants and their architect had themselves been guilty of delay on their part in providing plans and setting out the ground, and had so caused the delay and want of progress on the part of the plaintiff.

This depends upon the proper construction of the contract; and, to arrive at that, we must consider what the subject-matter of the contract is, and what are its terms.

The defendants are a public body, the Bury Improvement Commissioners; and, being also a burial board, were about to inclose a cemetery with boundary walls, and to erect chapels and other buildings; and the plaintiff, being a builder, entered into the contract stated in the declaration, which bears date the 2nd of October, 1866, by which he agreed to execute the works for the sum of 9767*l.*, within the time and according to the plans and in the manner stated in the specification.

The important clauses of the specification form part of the declaration, and from them it appears that the works were to be executed according to certain plans and drawings which were annexed to the specification, that additions and omissions were not to annul the contract, but that they should be added to or deducted from the contract price by the architect; and by clause 4 the architect was to be at liberty to give fresh drawings, and so to vary the mode in which the work was to be done, and also to order further works not comprised in the contract to be executed, and works comprised in it to be omitted; and the plaintiff was to furnish, on

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signing the contract, a schedule of prices for the purpose of estimating the value of additions and deductions.

There is by clause 24 a provision enabling the architect from time to time, for certain specified causes, by writing under his hand, to extend the time for completing the works. This clause will be afterwards more particularly adverted to.

The 27th clause is the important one upon which the question in this case turns. It is obvious, from the nature of the works contemplated by the contract, that it was essential that the defendants should have some means of insuring the completion of the works at or about the time agreed. It would not have been sufficient for them to have an action for the delay, or even an action for any agreed penalties for delay: what they required was the specific performance of the thing itself; otherwise, the works might be delayed indefinitely, and no legal redress would be adequate.

In order to insure this, the 27th clause is inserted; as is not unusual in works of a public nature. By that clause the defendants are authorized in certain events to put an end to the contract by notice in writing, and to enter upon and take possession of the works and materials upon the ground, and plant, and to use or sell them as their own property.

In connection with this it is proper to bear in mind that by the 28th clause provision is made for the completion of the works by the defendants themselves, and for the payment to the plaintiff for all work actually done when possession is taken, as well as for the value of the materials, implements, and tools provided by the contractor and taken to by the burial board; so that the 27th clause, for determining the contract, the necessity for which we have pointed out, is thus deprived of its apparently penal character.

The events under which the defendants are entitled to put an end to the contract are various,—the bankruptcy of the plaintiff, and events of that nature; and then follow the words which give rise to the present question, viz. in case "the contractor shall not, in the opinion of and according to the determination of the architect, exercise due diligence and make such due progress as would enable the works to be effectually and efficiently completed at the time and in the manner aforesaid."

The object of wording the clause in this way, and making the

determination of the architect the test, is obvious. The putting an end to the contract, and seizing the property of the contractor, is an act involving serious consequences, as this case shews; and therefore it is essential to ascertain beforehand the existence of the state of things upon which the right depends. If the right to enter depended only upon the default of the plaintiff, the plaintiff would probably deny the default, and there would be a resistance and conflict when the entry was made; and therefore provision is made for placing this matter upon the footing of an ascertained fact; and the determination of the architect that the contractor is not making due progress is to entitle the defendants to take possession and complete the works themselves.

The result of this consideration of the contract is, to satisfy us that this term is an essential part of the contract as long as the contract subsists and is being acted on, and that it cannot under any circumstances be struck out of it. To strike it out would be to make a new and different contract: and, if it remains a part of the contract, it follows that it is lawful to act upon it.

That being so, there is no doubt,—as appears, indeed, by the declaration,—that the plaintiff was executing the works under the contract as originally entered into; it was subject to this right of the defendants; and the plea shews that the determination of the architect had been given, and due notice of it in writing; and therefore the act complained of is well justified.

The replication is insufficient, because it does not shew that this clause was not in operation and could not be legally acted on. It alleges in substance that there had been some default in the defendants and in the architect in providing plans, defining roads, &c., and that this default had caused the plaintiff to be behind. It ought not to be lost sight of that the defaults specified are not wrongful acts of the defendants themselves; such, for instance, as keeping the plaintiff out of possession of the land; but they are more properly neglects of duty on the part of the architect, as will be more particularly pointed out hereafter.

This might have been a good replication, if the plea had been founded on the actual neglect and delay of the plaintiff: but the plea is equally good, whether there had or had not been actual neglect and delay on the part of the plaintiff,—the parties having

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agreed that the determination of the architect shall settle that matter, so as to bar the inquiry into the actual fact. It would clearly be no answer to this plea to allege that there had in fact been no want of due diligence or of making due progress. A very little consideration will shew how difficult, almost impossible, it would be for a judge and jury to master a multitude of plans and drawings and voluminous specifications, so as to arrive at a satisfactory conclusion, or even to investigate such a matter. The difficulty would only increase the expense of the attempt, which would nevertheless be soon given up. The architect, who prepared the plans and specifications, and who knows what was to be done in the first instance, what had been done, and what remained to be done, and who had watched throughout the progress of the works, and been in constant communication with the builder, is the only person capable of determining such a matter; and the parties have therefore agreed to be bound by his determination.

If the plea had been founded upon the actual neglect and delay of the plaintiff, so as to make that a fact to be tried by the jury, as the claims for penalties would have been under the 29th clause, then the case of *Holmes* v. *Guppy* (1), and other authorities to the same effect referred to in the argument (which indeed only apply a maxim of the common law), would have applied. The plaintiff might have answered,—"You caused this by your own default;" and the whole matter must have gone to the jury. But you cannot say that the determination of the architect that the plaintiff was not proceeding so as to complete the works effectually and efficiently, was caused by the default of the defendants; and the replication is not so shaped as to do so, and therefore that determination remains unanswered.

If in fact the defendants had refused to perform any conditions precedent to the plaintiff's proceeding with the contract, such, for instance, as giving possession of the ground, the plaintiff would have been entitled to throw up the contract and to recover his damages: but, if he afterwards proceeds with it, he waives this so far as it is a condition precedent, and, even in that case, which, as will appear hereafter, is very different from the present, he must proceed upon the whole contract, retaining of course any right of

(1) 3 M. & W. 387.

action to recover damages, if there has been a breach of the contract on the part of the defendants.

It must be borne in mind that this is not a case of cross money claims. What the defendants claim is, the right to have the works completed specifically; and therefore the conclusion cannot be influenced by the consideration of avoiding circuity of action. The replication now under consideration also alleges that the architect granted no extension of time for the completion of the contract. It appears to us, however, that the reasons above given are equally applicable.

The question is whether, as the contract proceeded, the 27th clause,—I mean that part which we are now considering,—was in operation. By the contract, the works are all to be completed by the 2nd of October, 1868: but the architect may extend the time for specific reasons. If he does not, it can hardly be contended that the builder could throw the contract up: and, if he does not throw it up, but proceeds with it, the contract must remain, and with it the 27th clause. The plaintiff by his declaration relies upon the entire original contract as the foundation of his claim. It certainly does not appear to us that the refusal to extend the time could be regarded as having the effect of striking out of the contract either the time within which the contract was to be completed, or that part of the 27th clause which we are considering. Might it not be said with equal force that, if there was an insufficient extension of the time, the same consequences would follow? If, for instance, it was said that the plaintiff was delayed two months, and the architect only extended the time one month, it could hardly be said that, if a jury thought there had not been a sufficient extension of time, the defendants were under such an agreement to lose the whole benefit of this clause, which enables them to complete the works in time, if the plaintiff does not.

But, further, when the matter is looked into, the alleged defaults are in reality not defaults of the defendants themselves, but of the architect. And, though the replication speaks of the default of the defendants and the architect, yet, if the matters complained of come within the province of the architect, and not of the defendants, the adding the word "defendants" in the replication can make no difference. The alleged defaults consist in not providing plans and

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drawings, not laying out the ground, not defining roads, and not giving instructions. These were matters to be done by the architect, and not by the defendants. The builder was under no obligation to execute plans and drawings provided by the defendants, or to attend to their instructions. From the time when the contract was executed, the plaintiff having of course license and permission to go upon the land for all the necessary purposes, the defendants themselves had nothing more to do except to pay the regular instalments upon the certificates of the architect.

There were lodges and several other buildings to be erected; and no doubt it was the duty of the architect to lay out the ground where each building was to be placed, and also to give drawings shewing the manner in which the various parts of the work were to be done, and, as the builder had some work to do in connection with the roads, to define the lines of the roads and give all necessary instructions. These matters were not all to be done at the same moment, but some at first and others as they were respectively wanted, and must be matters, as we cannot help thinking, more or less in the discretion of the architect as to the time when the several works are to be proceeded with. In carrying into effect a work of magnitude like this, some irregularities would probably occur. The architect complains of the want of progress, and the builder of the want of instructions and plans. But, how can the common-law maxim that a man shall not take advantage of his own wrong, or complain of a breach of contract which he has himself caused, be applied to the dilatoriness of the architect, who is intrusted by the agreement of both parties with a complete discretion as to all matters connected with the contract? The 3rd clause in effect gives him an unlimited discretion as to allowance for extras. He may, among other things, by the 4th clause vary the instructions as to the manner of executing the works, and order any additions, being himself the judge whether any extension of time under clause 24 shall be given. He may, by the 22nd clause, without any recompense, claim, or demand, stop the works for such time as he thinks proper, and impose upon the builder the expense of preserving the works during the interval and making good any damage; and it is entirely in his discretion whether he will grant any extension of time under the 24th clause or not. This clause

was, no doubt, chiefly intended to provide for the case of a frost making it injurious to proceed with the works while it lasted; but still it leaves this, which might cause a greater or less delay, entirely in the discretion of the architect. And finally, not to mention other matters, he is by the 34th clause made sole and final judge of all disputes which can arise between the builder and the employers; and, in order to prevent the possibility of litigation, it is agreed that he is not to be required to answer or explain any matter connected with any certificate or award, or to give reasons or grounds for any determination.

Having regard to the powers given to him, and the obvious object of making his determination binding, it does not appear to us to be reasonable to make the validity of his determination depend upon the opinion of a jury whether he has himself been guilty of undue delay. It would, in effect, be making a new contract, by adding a proviso or condition to the 27th clause, viz., "provided that the architect himself shall not have been guilty of delay in providing plans," &c.; and such a proviso would be a contradiction to the whole spirit of the contract, which is to make the determination of the architect conclusive and not open to question.

If the view now taken of the effect of the replication be correct, and the default set up is that of the architect, whose conduct the defendants cannot control, *Holme* v. *Guppy* (1) and the other cases referred to do not apply, and the objection made to the validity of the architect's determination altogether fails.

There is another distinct ground upon which the second replication, which we are considering, is defective. The determination of the architect, upon which the plea is founded, is not a determination only as to the time in which the works will be completed, but as to the manner,—as to their being efficiently and effectually completed; and, as we have before pointed out, the architect is not to give his reasons or grounds for any determination. It is quite consistent with the determination of the architect, as set forth very properly in the words of the 27th clause, that it was really founded upon this, that, though the works could be completed by the time, they would be done so badly as to require to be pulled down. The replication gives the go-by to this, and assumes that

(1) 3 M. & W. 387.

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the determination is only as to the time: it then gives what we have submitted is an imperfect answer as to the time, but is no answer at all to the other matter involved in the determination; for, how could it possibly be said that the delay of the architect in providing plans, &c., caused the works not to be completed efficiently and effectually?

For the above reasons we think the third plea is good, and the second replication to it bad, and it is unnecessary to consider the rejoinders. But we by no means say that, if the second replication to the third plea could be read in any way as a primâ facie answer to it, the rejoinders would not be good answers to the replication. The third rejoinder in reality only states what ought to be assumed to be the case, viz. that the determination of the architect was formed upon a bonâ fide consideration of all the circumstances. It is a mistake to suppose that, because the plaintiff was not in fact making the requisite progress, the architect, as a matter of course, was bound to give his determination so as to entitle the defendants to enter. Before giving out his determination, he ought, being final judge in the matter, to consider all the circumstances connected with the defective progress; and it appears by the rejoinder that he did.

With regard to the third and fourth replications to the second plea, we are of opinion that they are clearly bad. They are not founded upon any default of the defendants, but upon there having been some of the events mentioned in the 24th clause, such as make it the opinion of the architect that the plaintiff had been unduly delayed, and so authorize him to extend the time; and it then alleges that the architect had not extended the time.

This determination of the architect not to extend the time though he had authority to do so, cannot make the 27th clause inapplicable, so as to deprive the defendants of the benefit of it.

In our opinion, the judgment of the Court below in favour of the defendants upon all the demurrers ought to be affirmed.

KELLY, C.B., read the judgment of Blackburn and Mellor, JJ. :—

The questions in this case are raised by demurrers to the second, third, and fourth replications to the third plea, and to the second and third rejoinders to the second replication to the third plea.

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The Court of Common Pleas has given judgment that all three replications are bad in substance, and that both the rejoinders are good in substance.

We agree with them in thinking that the third and fourth replications are bad in substance: but we have come to the conclusion that the second replication is good in substance, and the two rejoinders to it bad in substance, and consequently that the judgment of the Court below ought so far to be reversed.

The question depends entirely on the true construction of the contract which is set out in the declaration. By that contract, the plaintiff, as contractor, agreed to execute certain works described in a specification, for the sum of 9767*l.*, according to the terms and conditions in the specification contained. Such of the conditions as are material are set out in the declaration. The 36th is, that, if the works are let in one contract, the whole is to be completed on or before the 2nd of October, 1868. The 4th condition gives power to the architect (employed by the commissioners) to alter the specification and plans, and to order any further works not contemplated by the specification and plans. It was, of course, contemplated by the parties that this power would be exercised in a reasonable manner: but it is quite unlimited in its terms, so that it is in the power of the architect under the contract to increase the quantity of the works without limit. The contractor, if he so pleased, might bind himself to execute whatever the architect might require before the 2nd of October, 1868: but, unless the intention so to bind himself appears, the implied contract would be that he should have a further reasonable time to execute such additional works as might be required. No question, however, is now raised as to any extra works ordered; and it is therefore unnecessary to express any opinion as to what the contract is as to those.

The contractor also, from the nature of the works, could not begin his work until the commissioners and their architect had supplied plans and set out the land and given the necessary particulars; and therefore, in the absence of any express stipulation on the subject, there would be implied a contract on the part of the commissioners to do their part within a reasonable time; and, if they broke that implied contract, the contractor would have a

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cause of action against them for any damages he might sustain, and the commissioners would be precluded from taking advantage of any delay occasioned by their own breach of contract: for, it is a principle very well established at common law, that no person can take advantage of the non-fulfilment of a condition the performance of which has been hindered by himself; see Com. Dig. Condition (L); and also that he cannot sue for a breach of contract occasioned by his own breach of contract, so that any damages he would otherwise have been entitled to for the breach of the contract to him would immediately be recoverable back as damages arising from his own breach of contract. These principles have been applied to contracts very analogous to the present, in the cases of *Holme* v. *Guppy* (1), *Russell* v. *Da Bandeira* (2), and *Westwood* v. *Secretary of State for India* (3), which were cited by Mr. Manisty on the argument in the Court below, and also before us. And we do not understand the Court of Common Pleas to question these principles, or the authority of these decisions.

But it is obvious that, under a contract containing such stipulations, it would be very unlikely that the stipulation requiring the works to be completed by a particular day should be effectual; and in prudence the parties might make stipulations to fix and ascertain the additional time to be allowed, without leaving it open to a jury to determine what is reasonable.

The Court below have thought that the parties in this case have agreed to make the architect the sole and exclusive judge of what additional time should be allowed, in case the contractor was delayed either by having additional works put upon him under the contract, or in consequence of breaches of contract on the part of the commissioners, and have also made him, and him alone, the judge to determine whether there has been any breach of contract on the part of the commissioners.

We agree that, if the parties have so contracted, the Court cannot inquire whether this is a prudent engagement on the part of the contractor: but we think that, where the effect of giving such a construction to the contract would apparently be to put one

(1) 3 M. & W. 387. (2) 13 C. B. (N. S.) 149; 32 L. J. (C.P.) 68.
(3) 7 L. T. (N. S.) 736.

party completely at the mercy of the other, we ought not to give that construction to the contract, unless the intention is pretty clearly expressed. It is not to be inferred that the one party meant to bind himself so very stringently, unless it is so stated; and the commissioners ought to take care to select words which the contractor could not misapprehend, if such was their object.

In the present case, the portion of the contract which is relied on as expressing such an intent is the 21th condition, which is as follows:—[His Lordship read the condition]. It is to be observed that, in the *recital* with which this condition begins, no distinction is made between delays arising from additions which are authorized by the contract, delays arising from unusual inclemency of the weather (a risk which the contractor has taken on himself, though it might give rise to a claim in misericordiam), and delays arising from breaches of contract or alleged breaches of contract on the part of the commissioners, for which the contractor would have a right to recover damages: in either case it is provided that "it shall be lawful" for the architect to grant an extension of time; but it is neither said that the architect must give it,—which, in case the delay was from the inclemency of the weather, would not be reasonable,—nor that the contractor must accept whatever extension of time the architect is pleased to give, in full satisfaction of his claim for damages, which, if the delay from the fault of the commissioners was great and the damages consequently heavy, might be very unreasonable.

It is true that, if both parties had confidence in the architect, they might trust him with the power to bind both parties: but we cannot find any intention expressed to bind the contractor to abide by his decision. It seems to us that the meaning of the condition is, that the architect shall have authority to bind the commissioners by granting an extension of time; and that, if he does so bind them, and the contractor accepts it, it shall be taken as full compensation for any damages sustained. If more was intended,—which, however, we cannot think,—it seems to us clear that it has not been expressed. At all events, there is nothing stipulating that the contractor shall have no remedy for any breach of contract on the part of the commissioners, where the architect has not thought fit to extend the time.

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The Court below have ascribed to the architect a more extensive authority than, as it appears to us, they were warranted in doing. The error into which they appear to have fallen is to be found in the statement of Willes, J., in his judgment, of the effect of the matters stated in the replication in question, in which he is reported to have said (1) that they were "in truth matters which the architect ought to have taken into his consideration in determining whether there should be an extension of the time, and therefore also in determining whether the plaintiff used due diligence."

This appears to us to be founded upon a misconception of the effect of the 24th clause of the contract, for the reasons before stated.

If we are right in the true construction of the contract, the decision of the demurrers follows clearly. The second replication confesses that, as is alleged in the third plea, there was such delay that in the opinion of the architect the works could not be completed in the stipulated time, so that, under the 27th condition, the defendants were primâ facie entitled to put an end to the contract; but it avoids this by averring that this delay was occasioned by the defendants' own breaches of contract, and consequently that, on the principle before stated, the defendants cannot take advantage of the delay thus occasioned: and, unless the contract bears the construction put upon it by the Court below, this is a good avoidance. The two rejoinders to this replication would be good, if the parties had agreed that the architect should be the sole judge whether there had been a breach of contract on the part of the commissioners occasioning delay: but, if we are right in the construction of the contract, there is nothing to this effect in it, and consequently these two rejoinders are bad.

The third and fourth replications are based on the supposition that there is a stipulation in the contract that the architect should grant further time when it is reasonable, or at least when he thinks it reasonable, even though the delay may have been occasioned by the inclemency of the weather. But we find no such stipulation in the contract, and consequently agree with the Court below in thinking those two replications bad.

(1) Law Rep. 4 C. P. at p. 762.

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KELLY, C.B. I now proceed to deliver the judgment of my Brother Channell and myself:—

In this case we should have been content to have simply adopted the judgment of my Brother Blackburn, in which we in substance concur; and observing that, inasmuch as it is admitted on the record that the alleged failure by the plaintiff to use such diligence and to make such progress as to enable him to complete the works by the day specified was caused by the failure of the defendants and their architect to supply plans and set out the land necessary to enable the plaintiff to commence the works, the rule of law applies which exonerates one of two contracting parties from the performance of a contract when the performance of it is prevented and rendered impossible by the wrongful act of the other contracting party. But, inasmuch as the argument for the defendants and the judgment of the Court below assume that by the terms of the contract the architect had power to determine whether the delay of the plaintiff to proceed with the works so as to complete them by the day specified had or had not been caused by the failure of the defendants to supply the necessary plans and set out the land, and, further, that that power was conferred upon him by the 24th clause,—it becomes necessary to consider the real meaning and effect of that clause, which we think will be found to confer no such power, and to have no operation whatever upon the real question in this case.

The record shews that the plaintiff contracted with the defendants to erect certain buildings upon their land, the defendants setting out the land, and supplying plans for that purpose; and that, before the plaintiff could commence the execution of these works, the defendants, under the 27th clause of the conditions appended to the contract, entered upon and took possession of the works, and refused to permit the plaintiff to proceed with the performance of his contract. And he alleges that he has thereby lost large profits which he would have acquired by the execution of the works.

The defendants plead a justification under the before-mentioned 27th clause, alleging that the plaintiff failed in the due performance of certain parts of the undertaking, and did not in the opinion and according to the determination of the architect exercise due

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diligence and make such due progress as is provided in the 27th clause, and as would have enabled the works to be effectually and efficiently completed at the time and in the manner provided by the agreement, and thereupon the defendants gave notice to the plaintiff under the clause in question that they determined the contract and would proceed to carry on the works themselves. To this the plaintiff has replied that his alleged failure and non-exercise of due diligence, and not making such due progress, were caused and occasioned by the delay and default of the defendants and the architect in supplying plans and drawings and in setting out the lands and defining the roads and giving such particulars as would enable the contractor to commence the works. There are two other replications, which from the view which we take of this case become immaterial, and which need not be further noticed.

To the above replication there are a demurrer, and two rejoinders to the effect that the non-exercise by the plaintiff of such due diligence, and the non-making of such due progress, *were not in the opinion and according to the determination of the architect caused and occasioned by the acts and orders, or by the negligence and defaults of the defendants and their architect;* and, further, that the said opinion and determination of the architect were formed after due consideration of the facts and circumstances relating to such failure. And to these rejoinders there is also a demurrer.

We are of opinion, looking to the whole record, that the single question which arises is, whether, by the terms of the contract, if a delay shall take place on the part of the plaintiff, which in the opinion of the architect would disable the plaintiff to complete the works by the 2nd of October, 1868, but such delay is caused by a breach of contract on the part of the defendants, in not supplying plans or setting out the land upon which the buildings are to be erected, the architect has power to determine and bind the plaintiff by his determination that the delay was not so caused by the defendants, and so, whatever may be the truth of the case, enable the defendants to put an end to the contract, and enter and take possession of the plaintiff's materials under the 27th clause.

If the contract has conferred such a power upon him, it may be that the rejoinders sufficiently allege that he has exercised it, and determined against the plaintiff. But, if he has no such power, it seems to us beyond all doubt that the well-established rule of law contended for by the plaintiff applies to this case; that the plaintiff's breach of contract is excused by reason of its having been caused by the defendants' breach of contract; and that the defendants cannot, therefore, acquire by means of their own wrongful act or default the right to enforce the provisions of the 27th clause.

The contract provides that if the plaintiff shall not, in the opinion of the architect, make due progress, the defendants may determine the contract; and the defendants allege that the plaintiff did not, in the opinion of the architect, make such progress. The plaintiff replies that he was prevented from making such progress by the breach of contract of the defendants. Thus, the contract primâ facie entitling the defendants to put an end to it, the law says that they, having themselves prevented the plaintiff from making such progress, shall not take advantage of their own wrong, and put an end to the contract under the 27th clause.

Now, the replication directly avers that the defendants have prevented the plaintiff from making the required progress. And this the defendants do not deny. But they rejoin that the defendants have not *in the opinion and according to the determination of the architect* prevented the plaintiff from making due progress.

This raises the question whether the effect of the contract is to confer a power upon the architect to determine, and to bind the plaintiff by his determination, that the defendants have not by their own wrongful act or default prevented the plaintiff from proceeding with the works, although in truth and in fact they have so prevented him.

Now, in considering this question, we agree that we are not to assume a jurisdiction which we do not possess, to mitigate the hardship upon contractors of clauses, however oppressive, which are sometimes, and indeed most commonly, introduced into agreements of this nature: but we must take care also not to add to

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their severity, and to the injustice which they are often the means of inflicting upon a contractor, by imagining stipulations which are not to be found in the contract, and which the parties have never entered into or contemplated.

Where, then, is this power to be found? The contract is wholly silent upon the point. The 27th clause gives the architect the power to determine whether the plaintiff has used due diligence and made due progress, but not whether his failure to do so has been caused by the wrongful act or default of the defendants. It must, therefore, be by the 24th clause, if at all, that this power is conferred. Now, when we look to this clause, we find it is simply this:—If from any one of a number of causes the plaintiff shall, in the opinion of the architect, have been unduly delayed or impeded in the completion of his contract, the architect may grant an extension of time for its completion. It is remarkable that it is nowhere averred that the architect was ever applied to by either party for an extension, or took into consideration, of his own accord or otherwise, whether he should grant an extension. But, under whatever circumstances it may be imagined that he proceeded to act upon the clause, the words of it are plain and clear. If he had been of opinion that the plaintiff had been unduly delayed, he might have granted an extension; but then the contract must have continued in force, the plaintiff must have proceeded with the works, and the defendants could have had no power to put an end to the contract. If, on the other hand, the architect had not been of opinion that the plaintiff had been unduly delayed, the condition had not been performed, the event had not occurred upon which alone he had power to grant an extension or do any other act; he would have been functus officio; the clause would have had no operation, and he had no power to do anything at all. The clause contains no provision as to what may be done or not done, or as to any consequence resulting from the architect *not* being of opinion that the plaintiff had been unduly delayed, which state of things might well have existed without the architect having ever taken the question into consideration at all. Still less does it provide for any consequences to follow from the architect's having formed an opinion that the plaintiff had not been unduly delayed: and it is almost unnecessary to add that a power which is in effect

to inflict a heavy penalty upon one of two contracting parties, must be created in clear and unambiguous terms, or must arise by necessary implication.

The plaintiff, then, having expressly averred in his replication that his alleged default had been caused by the wrongful act or default of the defendants themselves, and this averment not having been traversed by the defendants, but the rejoinders merely alleging that the plaintiff's default had not, according to the determination of the architect, been caused by the defendants' wrongful act or default, we are of opinion that, the architect having no power under the contract to bind the plaintiff by any such determination, the rejoinders are no answer to the replication; and that the rule of law relied upon by the plaintiff is applicable to this case; that the defendants cannot take advantage of their own wrong; and that they had consequently no power to determine the contract under the 27th clause.

The plaintiff is therefore entitled to maintain this action, and the judgment of the Court of Common Pleas must be reversed.

Judgment reversed.

Attorneys for plaintiff: *Shaw & Tremellin, for P. & J. Watson, Bury.*

Attorneys for defendants: *Gregory, Rowcliffes, & Rawle, for Harper & Dodds, Bury.*

1870
Feb. 11.

CORNISH *v.* STUBBS.

Landlord and Tenant—Termination of Tenancy—Licence—Revocation.

9 C.P. 154
9 Q.B. 400, 405
266

There is no objection in law to a tenancy determinable by a week's notice to quit, and a reasonable time being allowed after the expiration of the notice for the tenant to remove his goods.

A. let a house to B. as weekly tenant on the terms that A. would allow B. a reasonable time to remove his goods after the termination of a notice to quit. A. died, and his son C. succeeded to the property and received rent from B. C. gave B. a week's notice to quit, and, at the end of the week, took possession of the premises and refused to allow B. a reasonable time to remove his goods:—

Held, that a jury were justified in finding that C. was bound by the stipulation respecting the tenancy entered into by his father, and that B.'s tenancy continued for a reasonable time after the notice so far as was necessary for the purpose of removing the goods.

A. allowed B. to stack timber upon a wharf adjoining the premises let to him by A., and the rent was paid partly in respect of this privilege:—

Held, that such licence might also be considered as continued by C., and that it could not be revoked without allowing B. reasonable time to remove the timber.

DECLARATION: First count, in trespass. Second count, that the plaintiff was in occupation of a messuage and warehouse, and was entitled to the use of certain wharf land thereto contiguous, and was possessed of a right of way on to the wharf land, and to the messuage and warehouse through a gateway, and entitled to have access, &c., to and from the wharf land, warehouse and messuage at all reasonable times, for the purpose of business or otherwise, or for attending any sale of the plaintiff's goods on the land or premises; and while the plaintiff was so in occupation, and was about to quit the premises, and his interest therein had but a short time to run, and he was desirous of selling by public auction, prior to his so quitting the premises, certain of his goods upon the said land and premises, and had for that purpose engaged an auctioneer and advertised the sale to the public, &c., and had otherwise been at great expense to make the sale publicly known, &c.; and the sale was advertised for and intended to be held on a day just prior to the plaintiff so ceasing to have any interest in the land and premises, and such a day as if the goods were then sold there would be not more than a sufficient time to permit the removal thereof from the land and premises before the plaintiff's interest therein ceased; and the

reversion in the land and premises expectant on the plaintiff's interest then ceasing was vested in the defendant and others, and the defendant had notice of all the premises hereinbefore alleged, yet the defendant wrongfully and maliciously shut the gates at the time of the sale, and obstructed the said way, and prevented the use of the right of way there, and excluded all those who had come to attend the sale from entering on to the premises, and prevented the auctioneer from entering the land and premises, and wrongfully and maliciously prevented the sale from taking place: averments of special damage.

Pleas: First, Not guilty. Second, to the first count: Not possessed. Third, to the same: Liberum tenementum. Fourth, to the second count: A denial of the plaintiff's right to the occupation of the messuage and land, and of his right of way.

Replication, taking issue on the pleas: and for a second replication to the third plea alleging a tenancy in the plaintiff.

Rejoinder, taking issue and alleging a termination of the tenancy by notice.

Surrejoinder, taking issue thereon.

At the trial before Cleasby, B., at the Warwick summer assizes, the facts, as found by the jury, were as follows. The plaintiff was a dealer in old timber and other goods, and had become a weekly tenant to the defendant's father of a house and warehouse, and on his becoming so it was expressly agreed between them that, on the termination of the tenancy, the plaintiff should have plenty of time to remove his goods. The defendant's father also gave the plaintiff permission to stack timber upon a wharf adjoining the warehouse. The defendant's father died, and the defendant became entitled to the property, and received rent from the plaintiff, which was paid for the privilege of using the wharf, as well as for the house and warehouse. Subsequently the defendant gave the plaintiff a week's notice to quit, and immediately after the week had elapsed shut the gate, which was the only entrance to the whole of the premises, without allowing the plaintiff a reasonable time for removing his goods, and put a stop to a sale which the plaintiff had advertised to take place, and which was a reasonable way of disposing of his goods. The jury found a verdict for the plaintiff for 100*l.*, one half in respect of the interference with

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the house, and the other half in respect of the interference with the plaintiff's rights over the wharf.

Wills obtained a rule for a new trial, on the ground that the judge ought to have directed the jury that a tenancy to be determined by a notice to quit of an indefinite duration was unknown to the law, and that the verdict was against the weight of evidence, and also to reduce the damages.

O'Brien, Serjt., and *Beasley* shewed cause. A condition that the tenant shall be entitled to hold the land till the crops have been gathered in is not an unusual term in farming leases, and is quite as uncertain a holding as that proved in this case. *Griffiths* v. *Puleston* (1) and *Knight* v. *Benett* (2) are instances, and all the other cases on the subject are collected in Woodfall's Landlord and Tenant, 9th ed. p. 590. Such a term gives the tenant an interest in the land, and not merely a right to go upon it to remove his goods, though even that would be sufficient to support this action. The license to place the goods upon the wharf was annexed to the tenancy, and was paid for by the rent, and must be held to have been assented to and renewed by the defendant after the death of his father, and could not be revoked without allowing the plaintiff time to remove his goods.

Wills and *Knight*, in support of the rule. The agreement that the plaintiff should have time to remove his goods was made with the defendant's father, and therefore the defendant was not bound by it unless it is to be considered a part of the terms of the letting, and not merely a personal contract. Such an uncertain termination to a tenancy is unknown to the law. A tenancy must have a time certain for its termination: the only exception is in the case of farming leases, and is there introduced for the benefit of agriculture. With regard to leases in general, this was early held to be contrary to law: *White* v. *Sayer*. (3) In that case the custom set up was for the tenant to have half a year to remove his utensils. The termination of the tenancy here is wholly uncertain, which makes this a stronger case; it was impossible to tell what goods would be on the premises, or how long it would take to remove them. The cases in which the landlord has been held entitled to

(1) 13 M. & W. 358. (2) 3 Bing. 364. (3) Palm. 211.

distrain while the tenant was continuing to occupy for the purpose of removing his goods may be explained by the supposition that a tenancy at will was considered to have been created, for in none of them had the tenancy been terminated by notice, and the very act of distraining would shew that the landlord had not determined his will.

At any rate, the damages ought to be reduced to one-half, for the right to place timber on the wharf was a mere license, and revoked by the death of the defendant's father; and if not, at any rate by the defendant's notice to quit.

BOVILL, C.J. I think there is no objection to a tenancy being created which is to be determined by a week's notice to quit, and a reasonable time being allowed after the expiration of the notice for the tenant to remove his goods. If such a tenancy is made out in point of fact, I think there is no objection to it in point of law. In this case the matter was left to the jury, and though the evidence was conflicting, I think they might properly find, as they did, that there was such a tenancy. It appears from Coke upon Littleton, s. 69, that the law will sometimes annex to a tenancy a right for a tenant to remain in possession of the land, after the determination of the tenancy, for the purpose of removing his goods; and it is difficult to see, therefore, why the parties should not be able to annex such a condition to the tenancy by agreement. If such a right does exist, any interference with it would clearly give rise to a cause of action. In *Stansfeld* v. *Mayor of Portsmouth* (1), it was held that the assignees of a tenant could remove his goods, both fixtures and chattels, within a reasonable time after the tenancy had been determined by forfeiture. There WILLIAMS, J., says: "It comes then to this, that the lessors are, at the expiration or other sooner determination of the term, to take the ship-building fixtures, and the tenant is to have the others; and if so, it follows that the latter is to have a reasonable time for their removal." And WILLES, J., says: "The true construction of the lease is, that in case of the bankruptcy of the lessee, the lessors may re-enter and take the ship-building fixtures, but no others. That being so, the assignees had a right to enter to

(1) 4 C. B. (N.S.) 120, 133, 135; 27 L. J. (C.P.) 124, 128.

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take the others, and had a reasonable time for the exercise of that right." Although the tenancy was in that case by deed, and the decision turned partly upon its terms, the law annexes, as we have seen, a similar condition to farming and other leases even where there is no deed.

But it is further contended that, though this might have been the case with respect to the original lessor, it is different with respect to his son, the present defendant, at any rate as far as regards the right to place timber on the wharf. It is clear, however, that the defendant agreed to the tenancy, and it is difficult to distinguish his position in respect to the privilege of using the wharf and the other terms of the letting: the plaintiff paid rent which was received by the defendant for his entire holding, including that privilege, and the jury have come to the conclusion that the defendant agreed to receive the plaintiff as his tenant upon the same terms and with the same rights which he had under the defendant's father. If such was really the agreement entered into by the defendant, there is no doubt that when he gave the notice to quit it put an end to the license to use the wharf; and then what was to happen? It seems almost necessary, from the nature of the license, that the plaintiff should have had a right to a reasonable time to remove his goods; and if he had, that right has been interfered with, and the plaintiff was entitled to bring this action. I think, therefore, the verdict should stand for the whole amount.

WILLES, J. I am of the same opinion. With respect to the goods in the warehouse, it was at first contended that there was no stipulation ever made by the plaintiff that he should have a reasonable time to remove his goods. When this failed, and it was proved that there was such an agreement with the defendant's father, it was then contended that the agreement did not bind the defendant. There was evidence, however, of its renewal by the defendant, from his permitting the plaintiff to remain tenant after his father's death, and receiving rent from him. If the letting had been by deed, there would have been no doubt about the defendant being bound, because the statute of Henry VIII. would have passed the obligation of the contract to him as assignee of the reversion; and

it has been established, and was laid down very clearly, though not, perhaps, for the first time, in *Buckworth* v. *Simpson* (1), that stipulations pass to successors in the case of yearly tenancies also, when rent has been paid either by the successor of the tenant to the landlord, or by the tenant to the successor of the landlord, and received without objection—that a jury, in fact, may infer from such payment, and from the fact of notice to quit not being given, a consent to go on, on the same terms as before; and a conventional law is thus made equivalent to that of Henry VIII. in the case of leases under seal. In this case, therefore, there was abundant evidence that the defendant was in the same position as his father would have been.

The only question is, therefore, whether such a stipulation could operate as an enlargement of the term, and I know no reason why it should not; no case has been cited to the contrary, and from early times it has been held that it could. I do not mean that it would operate as an extension for all purposes, but only so far as to give to the tenant a control over the premises, and the right to remove his goods and do all things necessary for that purpose—that is, a right annexed by law in the case of a tenant at will, and in that of an executor of a tenant for life: Coke upon Littleton, s. 69; and my Lord has referred to other illustrations of the right. It is strictly a stipulation with respect to the tenant's enjoyment of the land, and I see no reason why such reasonable stipulation should not be allowed to exist.

With respect to the license to stack timber upon the wharf, there may be more difficulty. No question arises in this case whether or not the landlord could have determined such a license before the termination of the tenancy, for he certainly did not do so; and the only question is, whether the tenant has a right to a reasonable time after the revocation of the license to take away his goods; and I am clear that he has. The rule of law is, that a simple license, in order to be binding on the licensor, must be under seal; but if it is not, the licensee is not a trespasser until the licensor revokes the license. Under a parol license the licensee has a right to a reasonable time to go off the land after it has been withdrawn before he can be forcibly thrust off it; and he could bring

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(1) 1 C. M. & R. 834.

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an action if he were thrust off before such a reasonable time had elapsed. That was Lord Cranworth's opinion in *Wood* v. *Leadbitter* (1); for he did not tell the jury that if they were satisfied that notice had been given to the plaintiff to quit the ground the defendant was justified in removing him, but that if they were satisfied that such notice had been given, and that before he was forcibly removed by the defendant a reasonable time had elapsed during which he might have gone away voluntarily, then the plaintiff was not, at the time of the removal, on the ground by the leave and license of Lord Eglintoun; and I take it that the Court of Exchequer adopted that summing up. In looking into the judgment in that case, it will be found that the cases as to persons putting goods on other persons' land were all reviewed, and the Court seem to have held that they were to be dealt with on the same principle as cases of personal license. Applying that view to the present case, I think that the barons would clearly have thought that the license to put the goods upon the defendant's land involved a right to take away his goods, and to have a reasonable time for doing so. It was on that ground that the Court approved of the decision in *Wood* v. *Manley* (2), which was the case of a license coupled with an interest. I think, therefore, that the license (which was probably limited to stacking for the use of the trade carried on in the warehouse), if revocable, was so only on the terms of the plaintiff having time to remove his goods; and I think that there was clearly evidence for the jury that the license had in fact been renewed by the defendant after the death of his father. I think this rule, therefore, ought to be discharged.

MONTAGUE SMITH, J., concurred.

Rule discharged.

Attorney for plaintiff: *Fearon, Clabon, & Fearon.*
Attorney for defendant: *Emmets, Watson, & Emmet.*

(1) 13 M. & W. 838. (2) 11 Ad. & E. 34.

1870
Feb. 14.

[IN THE EXCHEQUER CHAMBER.]

POTTER AND OTHERS *v.* RANKIN.

Marine Insurance—Chartered Freight—Notice of Abandonment—Unreasonable Delay.

Post 519

The ship *Sir William Eyre*, then on her outward voyage to New Zealand with cargo and government emigrants for Otago, was chartered by one De Mattos to proceed thence to Calcutta, and there load a cargo for London. The plaintiffs, who were mortgagees of the ship, caused a policy to be effected on her for 4000*l*., "at and from the Clyde to Southland (N. Z.), while there, and thence to Otago (N. Z.), and for thirty days in port there after arrival," and the interest insured was declared to be "homeward chartered freight." The vessel arrived at Bluff Harbour, Southland, on the 23rd of April, 1863, where she got aground, and the captain, finding a difficulty in getting her off, sent on the passengers and their luggage at the expense of the ship to Dunedin. She sustained some damage, but was got off, and grounded again twice, and did not finally get clear of the ground until the 1st of July, when she left for Port Chalmers, the port of Dunedin, where she arrived on the 4th. A survey was held on her at Bluff Harbour, and others at Port Chalmers, the result of which disclosed considerable damage, but not sufficient in the opinion of the surveyors to prevent her, after some repairs which they indicated, from proceeding to Calcutta, which she did, and there the surveyors recommended that she should undergo further examination. She arrived at Calcutta on the 7th of June, and it was then discovered that the damage she had sustained at Bluff Harbour was so great that to repair her so as to enable her to proceed on the chartered voyage would cost more than her value when repaired, plus the homeward freight. The charterer also it was found had stopped payment, and his agents at Calcutta refused to load the ship. The plaintiffs, as soon as they became aware of the state of the vessel, viz. on the 2nd of August, 1864, gave notice of abandonment to the underwriters both on ship and on cargo.

The expenses incurred in consequence of the vessel having grounded at Bluff Harbour, and also in consequence of proceedings against the master for breaches of the Passengers Act (18 & 19 Vict. c. 119), and for damage to and short delivery of cargo, having exhausted all his available funds, and it being found impossible to raise money on bottomry save at a ruinous price, and the plaintiffs' agents in New Zealand being unwilling to make advances to the captain without specific instructions from the plaintiffs, the vessel was detained there for want of means to do the repairs necessary to enable her to proceed to Calcutta, until the 14th of April, 1864. But for these circumstances, the sum received by the captain in New Zealand for freight and passage would have amply sufficed for all the ship's disbursements:—

Held, by the majority of the Exchequer Chamber (Cockburn, C.J., Kelly, C.B., Channell, B., and Lush, J.),—reversing the decision of the Court of Common Pleas,—that, the ship having by a peril insured against been incapacitated from earning the chartered freight, and the assured not being under any obligation to

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repair her in order to earn such freight, but, on the contrary, being justified as prudent men in abandoning her, the loss of the freight was a loss by a peril insured against; that the assured had not by the abandonment of the ship lost their right to claim for a total loss against the underwriters on freight; and that, under the circumstances, the delay in giving notice of abandonment was sufficiently accounted for, and the notice, if notice was necessary, was not too late.

Held, by Cleasby, B., that the plaintiffs' interest in and power of earning the chartered freight having been destroyed by their own act of abandoning the ship, and not by the perils which caused that election, they were not entitled to recover for an actual loss of freight by the constructive total loss of the ship; that, assuming that they could be entitled to recover, notice of abandonment was necessary; and that, the delay in giving such notice having been caused by the default of the plaintiffs or their agents, or of the captain, it could not be justified as against the underwriters, and that the notice was too late.

Affirmed L. R. 6 H. L. 83.

APPEAL by the plaintiffs against a decision of the Court of Common Pleas, discharging a rule to set aside a verdict found for the defendant. (1)

1. The action was brought to recover 100*l.* upon a policy of insurance effected by the plaintiffs in the sum of 4000*l.* on "homeward chartered freight" by the ship *Sir William Eyre*.

2. The declaration contained a count on the policy for a total loss, and the common money counts. To the first count the defendant pleaded denial of the insurance, of the plaintiffs' interest, of the loss by perils insured against, of the loss of freight through the alleged total loss of the ship, and that the ship without sufficient cause did not proceed on her voyage, but deviated therefrom; and to the money counts, never indebted. Issue thereon.

3. The cause was tried before Bovill, C.J., at the London sittings after Michaelmas Term, 1866, when the following facts were given in evidence or admitted on both sides:—

4. The plaintiffs are shipowners at Glasgow, and constitute the firm of Potter, Wilson, & Co.: the defendant is an underwriter at Liverpool.

5. On the 7th of December, 1862, the *Sir William Eyre* (of which ship the plaintiffs were mortgagees in possession) left Greenock under the command of Captain Blakey on a voyage to Southland, and thence to Dunedin, in Otago, New Zealand, having a general cargo and a large number of government emigrants on board.

(1) Law Rep. 3 C. P. 562.

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6. On the 9th of February, 1863, whilst the vessel was on her outward voyage, the plaintiffs entered into a charterparty with one De Mattos, according to which the *Sir William Eyre*, having discharged her cargo and passengers at New Zealand, was to proceed to Calcutta, and there load a homeward cargo for Liverpool or London.

7. A few days afterwards the plaintiffs caused the policy now sued upon to be effected, in order to cover for the voyage out the chartered freight to be earned under the above charterparty. The defendants underwrote the policy for 100*l*. It described the voyage insured thus,—"At and from Clyde to Southland, while there, and thence to Otago (N. Z.), and for thirty days in port there after arrival," and it described the interest insured to be "homeward chartered freight, valued at ——."

8. On the 23rd of April, 1863, the *Sir William Eyre* arrived at Bluff Harbour, Southland. While there, she drifted and took the ground; and the master, finding great difficulty in getting her off, sent on the emigrants and their luggage to Dunedin at the ship's expense.

9. On the 22nd of May the ship floated; and on the 27th a survey was held upon her. (1)

10. The ship remained aground, with the exception of brief intervals, until shortly before the 29th of May. On that day a violent gale arose, and again caused the *Sir William Eyre* to take the ground. She struck fore and aft, and remained firmly fixed until the 4th of June, when she was again afloat. Before, however, she could be brought up in the channel, she grounded again, and was not finally got off till the 1st of July, when she left for Dunedin.

11. It was admitted that what occurred whilst the ship was at

(1) By this survey the surveyors certify "that, having examined the vessel, and finding from the ship's log that she has lain upon the ground on the north bank of the harbour from the 16th to the 19th instant, so far as we can see she has sustained no damage which will prevent her from proceeding on her voyage; and we are of opinion that she may with safety proceed to her final destination. We find that she has strained in some degree aft, shewing it in the upper streak of sheathing, which is rent; also the main-mast appears to have settled below its original standing about two inches. But, not being able to ascertain if any damage is done to the vessel below water, we recommend that she be re-surveyed and her bottom examined, at the first convenient port she arrives at."

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Bluff Harbour was correctly described in the master's protest, a copy of which was appended to the case. (1)

12. On the 4th of July, 1863, the *Sir William Eyre* arrived at Port Chalmers, which is the port of Dunedin. While there, further surveys were made of the ship. (2) The aforesaid surveys and protest were duly sent home to the assured and received by them.

13. There was no dry-dock or patent slip in New Zealand, and consequently the extent of the damage which the ship had sus-

(1) This protest (which was signed by the captain, the first and second mates, and the ship's carpenter) gave a minute description of all the incidents of the voyage out, and of the condition of the vessel, as far as it could be ascertained, down to the time of her arrival at Port Chalmers.

(2) The substance of these surveys was as follows:—

July 10th, 1863. "Ship much strained fore and aft. Coat of mainmast seven inches down from its proper place. All the iron knees between decks strained. Coat of mizenmast three inches down. A number of sheets of copper off both sides of the ship above the water-line. Upper deck waterways, butts, and seams strained and leaking. We recommend the vessel's topsides, decks, waterways, and stanchions be thoroughly caulked, and docked at the first port of arrival."

August 25th, 1863. "Find the hold beams from the after part of the fore rigging to the after part of the main rigging very much bent and strained, eight hanging knees on each side more or less strained, the mainmast very much injured at the keel, a number of sheets of copper off the bottom on both sides above water; but by report of marine divers the bottom under water is in tolerably good condition, as per annexed certificate. We would recommend that the mainmast be lifted and properly repaired, also the step made good, one plank in each bilge be taken off to inspect the futtocks, the copper to be repaired where necessary, and when finished with the whole of the necessary repairs the ship to be thoroughly inspected and approved of before going to sea. We may add that, on each survey, we sounded the pumps, and found that the ship was making but one inch per day."

The certificate of the divers referred to was as follows:—"Having been under the bottom of the ship *Sir William Eyre*, we find on her starboard side a narrow strip of copper off about four feet long by two inches; her stern has a little copper off; and along her port side and bottom we find nothing whatever the matter, except a narrow strip two inches wide and fourteen feet long."

September 4th, 1863. "Having had bilge-plank out on both sides in the hold abreast of the mainmast, we find the futtocks in good sound condition, and the vessel remaining perfectly tight. We have no hesitation in recommending the captain to proceed in ballast on his intended voyage as soon as the necessary repairs recommended have been completed and approved. We also recommend that the vessel be put in a dry-dock or on a patent-slip, for further examination."

tained could not be more fully ascertained than appears from these surveys.

14. The *Sir William Eyre* remained at Port Chalmers until the 14th of April, 1864, being prevented solely from want of funds from making the necessary preparations to proceed to Calcutta. The master had not sufficient funds to defray the ship's charges and disbursements and the liabilites which he had incurred in New Zealand; and, not being able to raise such funds in New Zealand, nor Messrs. Dalgetty, to whom the ship was consigned at Otago, being willing to advance to him the money he required for the purposes aforesaid, he was obliged to wait until he obtained a sufficient remittance from the plaintiffs.

15. Messrs. Dalgetty corresponded regularly with the plaintiffs; and the letters which passed between them, and those which passed between the master and the plaintiffs, were set out in the appendix to the case. (1) The freight which was payable at New Zealand

(1) The material parts of the correspondence were the following:—

From Messrs. Dalgetty & Co., of Dunedin, to the plaintiffs.

Invercargill, May 16, 1863. "We have to announce the arrival of the *Sir William Eyre* at the Bluff on the 23rd ult. On the 12th instant the captain was sued upon nine informations by the emigration officer, and fined for breaches of ss. 24, 25, and 26 of the Passengers Act, 50*l.* each, in all 150*l.* We inclose report of the case. The information for want of medical comforts stands adjourned till the 18th, on which day he has also to meet sixty-five summonses from the passengers for deficiencies in the diet. She has but little cargo to discharge here, and will proceed to Dunedin in the course of a week."

Dunedin, May 16, 1863. "From copy of the *Southland News*, which we send by this mail, you will observe that Captain Blakey has been charged with a breach of nine different sections of the Emigration Act; and we regret that some of them have been proved, and fines imposed. We expect the ship round here in a few days."

Invercargill, June 17, 1863. "Captain Blakey, we doubt not, furnishes you by this post with full particulars of the very unfortunate position in which the *Sir William Eyre* has been placed since date of our last advice. The heavy damages given to the passengers, and the expenses consequent upon his getting on shore, have caused the disbursements greatly to exceed the amount due for freight: but, having seen Captain Blakey's instructions from you to avoid the expense of bottomry, it is likely that, when the ship clears from Dunedin, his draft against you will be taken for such balance as may be owing in the two ports."

Dunedin, June 18, 1863. "This vessel still remains at the Bluff aground. It seems to us that, if Captain Blakey would be more pushing, he could engage steam to take him off the bank and tow him up. We have sent him a message to this effect. This ship's expenses will, no doubt, exceed the captain's means; in which case, we

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amounted to about 1300*l.*, and was received there by the master. This sum would have been sufficient for the purposes of the ship, if

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hope he has instructions as to raising money."

Invercargill, July 17, 1863. "The *Sir William Eyre* got off the bank early on the morning of the 1st instant, and sailed at noon the same day for Dunedin, which she reached in safety. The ship's disbursements at the Bluff, irrespective of sending the passengers on to Dunedin, amounted to 1378*l.* 14*s.*, accounts for which will be forwarded you by the Dunedin house."

Dunedin, July 17, 1863. "We have at last the pleasure to advise the safe arrival in port of this vessel 4th instant. Inclosed we beg to hand you copy of the ship's accounts at Southland, and regret the large expenses incurred there require the accompanying draft on you (450*l.*) to balance same. We considered well before advancing so much money to Captain Blakey after he informed us that his vessel was not your own property, but only under your control and management. It seems to us that we were bound for your protection to see his judgments and other expenses paid. The Otago passengers having summoned Captain Blakey for damages, and he, finding that, if the cases were brought into Court, judgments would be given against him, agreed to pay them 10 per cent. on their passage-money, with a view to save law expenses."

Dunedin, August 17, 1863. "The *Sir William Eyre* would have been quite discharged some days ago, but for bad weather preventing discharge of the coals, now going on. The claims on this ship for damage and short-delivery threaten to amount to 1000*l.*, while by sketch of account inclosed we have already come under advance of 132*l.* 1*s.* 6*d.* We are anxious to save the vessel all delay and yourselves from loss, but hesitate to advance more money to Captain Blakey, considering the circumstances under which we now hear the vessel is placed in your management, without fuller authority. We anxiously look for your June letter, which will be here within four days, for some expression that will indicate your wishes in this respect."

Dunedin, September 18, 1863. "*Sir William Eyre* is still in port, being unable to settle claims or proceed to sea from want of funds. He has advertized for a loan on bottomry of 2400*l.*; but the rate of interest asked is so exorbitant (65 per cent.) that he has resolved to remain here until he receives funds from home. In the meantime, he will take goods on board his ship for stowage."

Dunedin, November 18, 1863. "*Sir William Eyre.* We expect the coming mail will bring us positive instructions how to clear out this vessel from here. We have consulted with Mr. Holmes since his arrival; and he thinks we have done well to wait for authority before advancing more money to the captain."

Dunedin, December 18, 1863. "*Sir William Eyre* still lies here employed as a hulk, waiting remittances from you to clear her out."

Dunedin, January 18, 1864. "*Sir William Eyre.* Judging from the tenor of your remarks, you will be disappointed at this vessel still remaining here. Our former letters would have explained our reasons for not advancing Captain Blakey more money, which we hope you will consider sufficient. Both Captain Blakey and ourselves look for your answer to our September letter, which will be due in a few days."

Dunedin, February 16, 1864. "We

she had without having met with any disaster prosecuted her voyage to Calcutta, and if none of the circumstances mentioned in

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are sorry that the ship has been here so long detained, and that you think we are to blame for her detention. We must say, however, that we still think we would not have been justified in drawing on you under the circumstances without instructions of some sort. Since the receipt of your favour now under reply, we have settled the claims on the ship, and now hand our account to this date, balanced by Captain Blakey's draft] to 2116*l.* 2*s.* 10*d.*, at sixty days sight."

Dunedin, March 18, 1864. "This vessel is still in port discharging her coals; but we expect her to get away by the end of the month."

Dunedin, April 18, 1864. "We have to advise that the *Sir William Eyre* sailed for Calcutta on the 14th instant, and now inclose supplementary account of the ship, balanced by our draft on you at sixty days sight, for 351*l.* 15*s.* 8*d.*"

From the plaintiffs to Messrs. Dalgetty & Co.

Glasgow, September 25, 1863. "*Sir William Eyre*, we are happy to observe, has been got off, and had arrived safely with you."

"Glasgow, October 24, 1863. "We regret to hear that the claims on this vessel for damage have been so heavy. We trust you will take care to pay no more than is necessary, and also that you have advanced money to Captain Blakey to meet his wants, taking his draft upon us for the amount, which shall meet due honour on presentation."

Glasgow, November 25, 1863. "*Sir William Eyre.* We note with much surprise and regret that the ship still remains in your port (Dunedin), and must say that we cannot understand why you have declined to advance Captain Blakey what money was necessary to discharge his claims, taking his bill on us for the amount. If we understand the matter rightly, you say that Captain Blakey informed you that we were only mortgagees, not owners, and that his drafts might be refused. Granting we were only mortgagees, surely it was for our interests that the ship should get away: and we cannot understand how you should have doubted for a moment that we should have honoured Captain Blakey's drafts for his disbursements. At any rate, our late letters have surely been explicit enough. But, in case the ship may be still with you when this reaches, we beg you will at once arrange for her proceeding to Calcutta, taking Captain Blakey's draft on us for the necessary disbursements, which shall be duly honoured."

Glasgow, December 24, 1863. "We received two letters from Captain Blakey, dated in September and October respectively, the former apparently having been intended for the previous mail. We trust that, on receipt of our August letters, you will have arranged to advance the money required, and allow the ship to proceed on her voyage."

Glasgow, January 24, 1864. "We are much annoyed to hear of this ship still remaining in port; and we certainly thought our letter of the 25th of August [no such letter appears] was sufficiently explicit to have justified you in advancing what money was required for the ship; and we do trust that she will not be detained much longer."

Glasgow, March 24, 1864. "We were sadly disappointed to find that the

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the correspondence between Messrs. Dalgetty and the plaintiff had occurred.

16. While the *Sir William Eyre* remained at Port Chalmers,

Sir William Eyre was still (18th of January) in your port. Our letter of the 25th of November, however, we trust will have induced you to send her off, according to your request."

Glasgow, April 25, 1864. "We are duly favoured with your letter of 16th of February; and are glad to hear that the *Sir William Eyre* was likely to get away from Dunedin at last. Captain Blakey's draft in your favour for 2116*l.* 2*s.* 10*d.* has been duly honoured."

Glasgow, June 24, 1864. "We have been favoured with yours of 18th of April, and are glad to hear that the *Sir William Eyre* had at last sailed for Calcutta. Captain Blakey's draft in your favour for 351*l.* 15*s.* 8*d.* has been duly honoured."

From Captain Blakey to the plaintiffs.

Dunedin, July 17, 1863. "We left harbour on the 1st, and arrived here upon the 3rd instant, since which we have discharged about 400 tons cargo. All going on favourably, with little damage. The ship has not made any water since coming off the bank at Bluff. I have signed a draft on your house for 450*l.*, being excess to freight payable there, as the disbursements at that port have been very heavy, in consequence of grounding and fines, &c. At present I cannot give you further information relative to my mainmast, as we are not yet near the step."

February 16, 1864. "Messrs. Dalgetty received your correspondence last mail for clearing all debts upon the ship; since which time I have ordered the coals stowed on board to be taken out, and am about preparing the *Sir William Eyre* for sea again."

April 13, 1864. "We leave Port Chalmers to-day for Calcutta, after having secured my mainmast and other necessary repairs before proceeding to sea, which have been surveyed and approved of by surveyors."

Calcutta, June 8, 1864. "I have at last arrived at my chartered port, where I find freight low, charterers so scarce, the sole cause of all my stopping in New Zealand. We advertise for the agents of the charterer to-day, whom I saw last evening, and who will not be responsible for the charterparty."

Calcutta, June 22, 1864. "We dock the *Sir William Eyre* on the 25th to inspect the bottom and metal. By draft survey forwarded through Messrs. Mackinnon, M'Kenzie, & Co., you will see that the repairs recommended will exceed the real value of the ship. The lifting of the ceiling so far as the second futtocks, replacing and bolting from keel to gunwale, will for this alone cost 2500*l.* The other repairs will estimate at about 4500*l.* Therefore I do not feel justified in commencing such serious repairs without first consulting you upon the matter. If, after the ceiling is lifted, we find some floors gone, there must then be an end of the ship."

From the plaintiffs to Captain Blakey.

September 24, 1863. "We duly received your letter of the 17th of July from Dunedin, and were glad to hear that you had succeeded in getting your ship off and bringing her there. We trust soon to hear of your having proceeded to Calcutta, and hope you may arrive in safety at that port, where we understand from your letter to Mr. Law that it is your intention to dock your ship. Should it be that your

and after she had discharged her cargo, the captain, in order that the vessel should not be wholly unproductive, permitted her to be stored with coals to the extent of 1200 tons, and received as rent for such coals 778*l.* 3*s.* 5*d.*

17. In February, 1864, the captain received the necessary funds from the plaintiffs, and he immediately proceeded to discharge his liabilities and have the temporary repairs which had been recommended by the surveyors completed, so as to enable the ship to proceed in ballast to Calcutta.

18. Port Sydney is a port where the ship could have been thoroughly repaired, and is about eight or nine days' sail from Port Chalmers; and the voyage from the latter place to Calcutta is much longer, and attended with greater risk, than the voyage from Port Chalmers to Sydney. The master did not know that there was a dry-dock at Sydney, and that the ship could be repaired there; nor did he make any inquiries as to the nearest port where his ship could be repaired, because he considered her capable of proceeding in ballast to Calcutta, whither she was bound by her charter, and where he knew that the repairs could be done.

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ship requires re-coppering or other repairs in consequence of having been ashore, we trust you will see that all is well and properly done."

December 1, 1863. "We are sorry to learn from Messrs. Dalgetty's letter dated 18th of September, that your ship was still detained at Dunedin, for want of funds. We cannot understand why your agents had not advanced what you required, taking your draft on us for their reimbursement. From the letter they would receive in October [the missing letter of 25th of August], no doubt they would do this; so, we trust you are now on your way to Calcutta, and that you will be clear as soon as this letter. We regret much that you have not kept us advised of your motions, nor sent us surveys of your ship at Dunedin, which you should have done. The want of that has put us to great inconvenience, and caused much difficulty in getting your ship insured from New Zealand to Calcutta, and which, for want of proper documents, we have only been able to get done for a limited sum, and against total loss."

April 16, 1864. "We have duly received your two letters of the 18th of February, by which we were glad to learn that you had at last a prospect of leaving Dunedin, and trust next mail will bring advice of your having sailed for Calcutta. You will learn on your arrival at Calcutta that your charterer, Mr. De Mattos, has failed; and we do not know whether his agents will be able to fulfil the conditions of the charterparty. We have, however, written fully to our friends, Messrs. Mackinnon, Mackenzie, & Co., and you will please be guided by them in these and all other matters."

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19. There are a great quantity of worms in Port Chalmers; and a ship lying there is likely to get wormed, if some of her metal has come off.

20. On the 14th of April, 1864, as soon as the temporary repairs had been executed, the *Sir William Eyre* left Port Chalmers for Calcutta, where she arrived on the 7th of June.

21. As soon as the *Sir William Eyre* arrived at Calcutta, the master went to the agents of De Mattos at that port, and applied to them to carry out the charterparty. A copy of the charterparty had been forwarded to them by De Mattos many months previously; but, as they had been informed in December, 1863, that he had (as the fact was) failed and stopped payment in that month, they had made no preparations for providing a cargo for the vessel, and, on the master applying to them, they absolutely refused to have anything to do with the ship or with providing a cargo. The master thereupon placed the *Sir William Eyre* in the hands of Messrs. Mackinnon & Mackenzie, the plaintiffs' correspondents at Calcutta.

22. After her arrival at Calcutta, the *Sir William Eyre* was put into dry-dock, and surveyed several times. Copies of the surveys and estimates made, and of the letters which passed between the plaintiffs and Messrs. Mackinnon & Mackenzie were set out in the appendix. (1) The surveys and estimates were duly forwarded to and received by the plaintiffs; and, upon the receipt, in the month of August, 1864, of the survey dated the 8th of June, the plaintiffs at once gave notice of abandonment to the defendant, and also notice of abandonment to the underwriters on ship; but neither of these notices of abandonment were accepted by the respective underwriters.

23. The *Sir William Eyre*, after she had been put at Calcutta into dry-dock, was moored in the Hooghly, and whilst she was there lying a violent cyclone, on the 5th of October, 1864, drove her from her moorings, and she was stranded and became a total wreck.

(1) These shewed an extent of damage to the ship from the stranding at Bluff Harbour so great that the cost of repairing her so as to enable her to earn the chartered freight would have materially exceeded her value when repaired, plus the homeward freight.

24. It was admitted that the cost of repairing the vessel at Calcutta so as to make her sea-worthy for carrying a cargo to England would have exceeded the value of the ship when repaired, plus the difference between the chartered freight and the current freight, which would amount to about 450*l.*

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25. The *Sir William Eyre*, which, at the time of her departure from Greenock in December, 1862, was worth about 8000*l.*, was in her unrepaired state at Calcutta in September, 1864, worth about 3000*l.*; and, even if she had met with no damage whatever, she would have been off her letter in January, 1865, and would not have been worth more than 4500*l.* A ship like the *Sir William Eyre* deteriorates at the rate of 12 per cent. per annum.

26. A list of the insurances effected upon the ship and freight was contained in the appendix.

27. At the trial no question was left to the jury; a verdict was taken for the defendant, subject to leave to move to enter it for the plaintiffs, the Court being by consent in place of the jury, and having power to decide both law and fact. Accordingly, in Hilary Term, 1867, the plaintiffs obtained a rule nisi to enter a verdict for them, with interest, on the ground that the underwriters were liable for the loss of the chartered freight. This rule was in Trinity Term, 1868, discharged.

28. The Court of Common Pleas, in a case of *Potter* v. *Campbell*, which was an action against the underwriters on ship, had decided, after the trial of this case, and before the argument of the rule, that the notice of abandonment was too late. A copy of the judgment in that case was set out in the appendix. (1)

The appeal came on for argument in the Exchequer Chamber at the sittings in error after Easter Term, 1869.

Sir G. Honyman, Q.C. (*Lanyon* with him), for the plaintiffs, contended that the events which took place at New Zealand constituted a constructive total loss of the ship and an actual total loss of the prospective chartered freight; that no notice of abandonment of the freight was necessary under the circumstances, there being nothing to abandon; and that, if notice of abandonment of freight was necessary, the notice given in August, 1864, was given

(1) See 16 W. R. 399. W.N. (1867) 222.

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in time, it having been given as soon as the plaintiffs were made acquainted with the condition the ship was found to be in when she was docked at Calcutta, and the delay having been occasioned by circumstances which the plaintiffs could not have foreseen and over which they had no control. Upon the first point he cited the following authorities:—*Idle* v. *Royal Exchange Assurance Co.* (1); *Mount* v. *Harrison* (2); *Roux* v. *Salvador* (3); *Moss* v. *Smith* (4); *Rosetto* v. *Gurney* (5); *Knight* v. *Faith* (6); *Stewart* v. *Greenock Marine Insurance Co.* (7); *Farnworth* v. *Hyde* (8); *King* v. *Walker* (9); *Grainger* v. *Martin* (10); *Fleming* v. *Smith* (11); Phillips on Insurance, ss. 1487, 1491, 1497, 1500.

Mellish, Q.C. (*Watkin Williams* and *Cohen* with him), was called upon by the Court to address himself to the first point. He contended that nothing short of an actual total loss of ship could cause a total loss of freight; for that there could be no total loss of freight so long as the ship remained in the possession and under the control of the owner; and that notice of abandonment was necessary. He referred to *Barclay* v. *Stirling* (12); *Benson* v. *Chapman* (13); *Kidston* v. *Empire Marine Insurance Co.* (14); *Barker* v. *Janson* (15); Arnould on Insurance, 3rd ed. 851, 977; Maclachlan on Shipping, 148.

Sir G. Honyman, in reply, referred to *Dickenson* v. *Jardine*. (16)

The Court took time to consider, and afterwards desired to have the second point argued. It was accordingly argued at the sittings in error after Hilary Term, 1870.

Sir G. Honyman, Q.C. (*Lanyon* with him), commented upon the

(1) 8 Taunt. 755.
(2) 4 Bing. 388.
(3) 1 Bing. N. C. 526, 544: in error, 3 Bing. N. C. 266, 271.
(4) 9 C. B. 94; 19 L. J. (C.P.) 225.
(5) 11 C. B. 176; 20 L. J. (C.P.) 257.
(6) 15 Q. B. 649; 19 L. J. (Q.B.) 509.
(7) 2 H. L. 159.
(8) 18 C. B. (N. S.) 835; 34 L. J. (C.P.) 207; in error, Law Rep. 2 C. P. 204. 12 Jur N.S. 999
(9) 3 H. & C. 209; 33 L. J. (Ex.) 167, (Ex. Ch.) 325. 11 Jur N.S 43.
(10) 4 B. & S. 9; 31 L. J. (Q.B.) 186.
(11) 1 H. L. 513.
(12) 5 M. & S. 6.
(13) 6 M. & G. 792: in Ex. Ch. 5 C. B. 330: in Dom. Proc. 2 H. L. 696.
(14) Law Rep. 1 C. P. 535; in error, Law Rep. 2 C. P. 357. 12 Jur N.S 665
(15) Law Rep. 3 C. P. 303.
(16) Law Rep. 3 C. P. 639.

(10) 8 C 8 Jur N.S 995

facts to be gathered from the correspondence and the surveys, and submitted that, under all the circumstances, there had been no default on the part of the plaintiffs or their agents in giving notice of abandonment.

Watkin Williams (*Cohen* with him), on the other hand, insisted that the plaintiffs might with the exercise of due diligence have sooner discovered the actual condition of the ship after the misfortune at Bluff Harbour, and had been guilty of unwarrantable delay in repairing and clearing the ship from Port Chalmers, and that consequently the notice of abandonmont given on the 2nd of August, 1864, was too late.

Cur. adv. vult.

The Court differing in opinion, the following judgments were delivered:—

CLEASBY, B. This is an action on a policy of insurance on freight. For the purpose of the present case, the facts may be shortly stated thus:—The vessel *Sir William Eyre* was chartered on the 9th of February, 1863, for a voyage to New Zealand, thence to Calcutta, and from Calcutta to London. The insurance in question was effected two days afterwards, and was for the voyage to New Zealand, and the subject-matter insured was freight to be earned under the charter from Calcutta to London. The insurance, therefore, is for the earlier part of the voyage out; and the thing insured is the freight home; so that the perils insured against are at an end long before the cargo by which the freight is to be earned is on board. This is not a usual transaction, because in general the whole voyage is insured by the same underwriters; but there is no valid objection to it.

The vessel before the termination of the voyage insured got aground and was with great difficulty got off; and she sustained such damage that on her arrival at New Zealand she was in such a state as to make her necessary repairs cost more than she would have been worth when repaired. This was not known at New Zealand, there being no means there of ascertaining the real condition of the vessel. After great delay, during which the vessel was used as a store-ship for coals at a considerable rent, some repairs were done so as to enable her to proceed to Calcutta; and

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on the 14th of April, 1864, she proceeded there, and arrived in safety. Upon her arrival, she was properly overhauled, and her real condition was ascertained. Thereupon, the vessel herself as well as the freight being insured, notice of abandonment was on the 2nd of August, 1864, given to the underwriters both on ship and on freight. The ship was in fact totally lost whilst lying at Calcutta, in the cyclone of the 5th of October, 1864; but this loss has nothing to do with the present claim.

This action is brought to recover the freight insured as before mentioned; and the question is whether the facts stated entitle the plaintiffs to recover for a total loss of the chartered freight. It was not contended that there was any case to recover for a partial loss; and indeed upon such a policy no such claim could possibly arise.

The Court of Common Pleas had decided, in a previous action to recover upon a policy on the ship in respect of the same voyage and damage, that there was no sufficient notice of abandonment, and therefore the plaintiffs in that action could not recover as for a total loss of the ship: *Potter* v. *Campbell* (1): and they held in the present case, as I understand the judgment, that, there being no absolute total loss of the ship, there was no total loss of the freight; and, without deciding that a proper notice of abandonment of the freight would have entitled the plaintiffs to recover, they considered that the notice in this case was insufficent (in conformity with the decision in *Potter* v. *Campbell* (1)), and therefore that the plaintiffs could not in that way complete their title to recover; and they gave judgment for the defendant. From this judgment the plaintiffs have appealed to the Exchequer Chamber.

Two questions have been argued,—first, whether there is such a total loss of the freight as to entitle the plaintiffs to recover, independent of any notice of abandonment,—secondly, supposing such notice to be necessary, whether the notice given on the 2nd of August, 1864, was a sufficient one in point of time.

In considering the question of total loss, it is necessary in the first place to examine what is the real nature of the interest which is said to be totally lost. It is not, as is usually the case, an interest in anything which exists and of which possession can be

(1) 16 W. R. 399.

had, as, for instance, a ship, or cargo, or even freight of cargo on board, of which the lien on the cargo gives a qualified possession: but, in such a case of chartered freight as the present, the interest is only a right to have cargo provided; it can only be enforced by action; and is in the nature of a chose in action. It is a right which may be of considerable or of little value. If, for instance, the chartered freight is high in relation to the current rate at the port of lading, and the charterer is a solvent person, then the right is of considerable value; but, if the current rate is higher than the chartered freight, or the charterer has become bankrupt or insolvent, it is of no value. It appears as a fact in the present case that De Mattos, the charterer, stopped payment in December, 1863, and that no cargo would have been provided under the charter after that month. In such a case as the present, that fact, from the form of the policy, would have no effect upon the amount to be recovered in the action, if the perils insured against caused a total inability to earn the freight: it is only adverted to for the purpose of shewing how peculiar the subject-matter of insurance is when the perils insured against terminate before there is any interest in possession.

The first question, then, for consideration in this case is, whether the damage done being such as to make the cost of repairs exceed the value of the ship when repaired, this of itself has the same effect as the actual loss of the ship, and makes the freight recoverable as totally lost. I am of opinion that it has not.

I may observe that this is the proper question to be considered, though the question chiefly argued was whether an abandonment was necessary or not,—a mode of argument which assumes that such damage to the ship must, with abandonment of the freight, amount to a total loss of the freight; whereas, in so peculiar a policy as this, the interest may be such as not to admit of abandonment, and so the policy only covers an actual total loss. We are dealing at present with the mere fact of damage to the extent mentioned, and not with the knowledge of that fact by the assured, and any election which they may make thereupon. All other cases of total loss of freight by loss of the ship are necessary consequences of the facts themselves; and this, if it be a case of total loss of the freight by what has happened, must be so too. If the

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ship goes to the bottom, or becomes a mere wreck incapable of repair, or is justifiably sold; in each of these cases the total loss of freight is a necessary consequence of the facts themselves. But, how can it be said that the necessary consequence of the ship being so damaged is that the freight is totally lost? The utmost that can be said is that the earning it is made very expensive: and this would depend upon the extent to which the repairs would exceed the value and the amount of freight which would probably be earned by repairing.

The general rule is, that there is no actual total loss while the thing remains in specie, however much it may be damaged. It must either be destroyed or its recovery irretrievably hopeless. This is the rule laid down in the text-books (see Arnould, s. 364), and is the effect of all the authorities. The case of *Roux* v. *Salvador* (1), relied upon in the argument for the plaintiffs, seems at first sight at variance with it; because in that case (which was an insurance on cargo), it was held that hides were totally lost which, though they existed at the time as hides, were damaged in such a manner and to such an extent that they could not be carried to their destination so as to be there delivered as hides. But that decision is placed upon a satisfactory ground by the judgment of the Court of Queen's Bench in *Knight* v. *Faith* (2), where it is explained that the decision proceeds upon the ground of the hides being virtually destroyed. The judgment in that case (which appears to me a most convincing one) corrects some erroneous opinions on the subject of abandonment which were gaining ground; and the authorities, which are fully considered in it, justify the rule above laid down. What is said by Lord Abinger in *Roux* v. *Salvador* (3) is there adopted, viz. "If he (the assured) elect to do this (that is, to treat damage as a total loss), as the thing insured or a portion of it still exists and is vested in him, the very principle of insurance requires that he should make a cession of all his right to the recovery of it, that the underwriters may be entitled to the full benefit of what may still be of any value."

6 H.L. 109

In the present case, the thing insured is the right to earn the

(1) 1 Bing. N. C. 526; 3 Bing. N. C. 266.

(2) 15 Q. B. 649; 19 L. J. (Q.B.) 509.

(3) 3 Bing. N. C. at p. 286.

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freight; and this is neither destroyed nor irretreviably lost because the ship is damaged to the extent alleged. The condition of realizing it, viz. repairing the vessel, is not made impossible, but expensive, and therefore difficult of performance. But this expense and difficulty form the equivalent in such a case to damage to the thing, where the thing exists in specie; and mere damage, to any extent, does not constitute a total loss.

It was argued on behalf of the plaintiffs that the damaged condition of the ship in such a case was a commercial total loss of the freight. There are two answers to this, if it has any definite meaning,—first, that it might be said with equal force that such a damaged condition of a ship was commercially an actual total loss because the vessel was not worth repairing, yet still without abandonment there is no total loss,—and secondly, that, in point of fact, though the damaged condition of the ship may in some cases make it a losing affair and therefore not commercial to repair and earn the freight, yet the contrary might be the case, and the commercial result of repairing would depend upon a variety of considerations.

One argument mainly relied on was, that, in such a case as this, there is nothing to abandon, and therefore abandonment would be ineffectual, and must be unnecessary.

The argument on both sides may be put thus:—The plaintiffs say, if the owner abandons the chartered freight to the underwriter, the latter is none the better; for, though he acquires a right to earn the freight, he can only earn it in the damaged ship, which is not his property, and of which he has no means of becoming the owner; so that, though the owner parts with his right, it is fruitless in the hands of the underwriter. The defendant says, if the damage to the ship entitles the owner to claim the freight, the underwriter must pay it, and he does so. The owner may then, if the charter is a good one, or for other reasons, repair the ship, and proceed to the port of loading and claim to have the charter performed (for, the charter has not been forfeited), and earn the full freight: and, how can it be said that the chartered freight has been totally lost, when he has insisted upon his right to earn it, and has earned it?

These are the difficulties on both sides.

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Perhaps, on a full consideration, it may appear that the abandonment to the underwriters is not in such a case necessarily inoperative, particularly having regard to those cases where the captain may in consequence become the agent of the underwriters in earning it.

It is true that, upon such damage to the ship, if the ship-owner elects (as he is entitled to do) to proceed no further with the voyage, and makes this known to the charterer, and so discharges the charterer, and the charter is put an end to, there is then absolutely nothing to abandon. What the effect of such election would be upon the policy on freight, is another question. But, as long as the charter continues in force, it can hardly be said that there is absolutely nothing to abandon. It often happens that the captain has made considerable progress in repairing the ship before the real extent of the damage is ascertained; and it is only when the owners receive the final survey and accounts that it is made known to them to be a case justifying an abandonment. Now, supposing this to occur, and the master to complete the repairs and to proceed on the voyage of the ship, acting, as he is bound to do, for the benefit of all concerned, and the owners at the proper time abandon the freight to the underwriters; would not the effect of this be that they would be entitled to recover upon their policy on freight, and the underwriters would be entitled as assignees (for, the abandonment has the effect of an assignment,) to the freight earned? and, if the ship was lost either in proceeding to the port of loading or from thence to the port of discharge, and so no freight earned, would not the owner have completed his title to recover against the underwriters, and the underwriters have lost what may be called their salvage?

This is not a fanciful case; but abandonments have again and again taken place, not only after the repairs are completed, but after the freight has been earned. This was so in the leading cases on the subject of abandonment to underwriters on freight: *Benson* v. *Chapman* (1); *Scottish Marine Insurance Co.* v. *Turner*. (2) Thus, such damage as has been mentioned does not necessarily involve as a consequence the loss of a prospective

(1) 6 M. & G. 792; in Ex. Ch. 5 C. B. 330: in Dom. Proc. 2 H. L. 696.
(2) 1 Macq. 334, 337.

freight; and it seems to me to follow from this, that, as there ought to be a clear and definite rule of abandonment, and not one depending upon the accidental circumstances of each case, and since there must be an abandonment in some cases to entitle the assured to recover, there ought to be in all. It was given in this case, in conformity with the usage; and the usage makes it the right of the underwriters. Convenience also is in favour of it; for, if the notice of abandonment is given, the underwriter knows his position, whereas, if not, he may not know for years whether he is to be held responsible or not. He cannot know the exact extent of damage, or the probability of the owner repairing, in each particular case; and the rule seems to be a reasonable and convenient one, that the owner should inform him of his determination in the usual way, viz. by notice of abandonment.

Another consequence may be noticed. If the notice be given, and freight be afterwards earned under such circumstances as I have mentioned, the underwriter has acquired a title to that freight; and the underwriter who has the benefit of the abandonment, as assignee of the freight, has also liabilities as ship-owner cast upon him; and there are settled rules for apportioning the expenses of earning the freight between the owner and the underwriter.

In applying what has been said to the present case, it must be borne in mind that the captain proceeded from Dunedin to Calcutta under the charter. In his letter from Calcutta, of the 8th of June, 1864, he says: "I have at last arrived at my chartered port, where I find freights low and charterers so scarce, the sole cause of all my stopping in New Zealand;" and he afterwards says that he on that day advertises for charterer's agents, so that his lay-days might begin. Up to that time, therefore, he was sailing under the charterparty, and there was no total loss of the freight; and the question seems fairly raised whether, by reason of any unjustified delay of the plaintiffs which had thus taken place, the abandonment of the freight, which came afterwards, was not too late.

The rule appears to be correctly laid down in Arnould, Vol. 2, p. 858, 3rd ed., that, as soon as the owner has all the requisite information, he must abandon immediately; but that, in the case of stranding, or partial wreck, he may wait "a reasonable time

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for more accurate information as to the nature of the loss or the actual extent of the damage." In the present case, it may be taken that, as soon as the owners had the requisite information, they abandoned immediately: and the question is, whether the time taken in obtaining the information was not unreasonable, being attributable in a great measure to the default of the owners and their agents. It is very much a question of fact; and, under ordinary circumstances, if I found my learned Brothers had all arrived at a clear conclusion, it is very unlikely that I should differ from them. But, in this case, the judges of the Court of Common Pleas have arrived at an opposite conclusion, and I am therefore bound to form my own opinion.

In endeavouring to apply the rule above given, we meet with the following facts:—The disaster occurred in May and June, 1863; and the extent of damage was ascertained in August, 1864, when the abandonment took place. It may be taken that between the damage and the 4th of September, 1863, there was no delay; and also that between the 14th of April, 1864, and the abandonment, there was no delay; and the question comes to this, whether the plaintiffs can justify the delay between the 4th of September, 1863, and the 14th of April, 1864, during which time the vessel was detained at Dunedin for want of funds. The materials for accounting for this want of funds are very imperfect. A long correspondence is given; but important letters are omitted. For instance, the plaintiffs, in their letter of the 24th of December, 1863, to Dalgetty & Co., say: "We trust that, on receipt of our August letters, you will have arranged to advance the money required, and allow the ship to proceed." The letter of the 24th of January, 1864, also refers to the August letter as having been sufficiently explicit. But the August letter is not given; and we could have judged from it whether it was the fault of the plaintiffs in giving insufficient instructions, or of Messrs. Dalgetty & Co. in not attending to them. Another omission is in not giving the accounts which were inclosed in the letters. The letter of Dalgetty & Co., of the 16th of February, 1864, incloses an account shewing a balance of 2116*l.* due to them for disbursements subsequent to the 17th of July, 1863, on which day a letter inclosed another account shewing a balance of 450*l.*, which was drawn for. Neither of these accounts is given; and

they would have shewn exactly what payments had been made, and what money had been received for passage and freight. In their absence, this was left to contradictory statements and argument. These documents should have come from the plaintiffs, as they have to account for the delay. We know that the expenses of getting the ship off were 1378*l.* 14*s.* (letter of Dalgetty & Co., 17th July, 1863); and we know by another letter of the same date that this was liquidated by means of money received for passage-money or freight and the bill for 450*l.*: but, how the immense subsequent expenses, viz. 2116*l.* 2*s.* 10*d.*, and 351*l.* 16*s.* 8*d.*, in addition to what was received for freight and the sum of 758*l.* received for hire of the ship, arose,—how much for the temporary repairs, how much for claims against the ship for damage to cargo and other defaults of the master,—we do not know, as far as I can collect, except the breaches of the Emigration Act, amounting to 150*l.* The conclusion at which I have arrived is, that, for the delay between the 4th of September, 1863, and the 14th of April, 1864, the master, the plaintiffs, and Dalgetty & Co., were all to some extent to blame. The correspondence between the plaintiffs and Messrs. Dalgetty & Co. shews that the plaintiffs were always complaining of Messrs. Dalgetty & Co. not making advances according to instructions, and the latter always complaining that they had insufficient instructions: see letters of the former of the 24th of October, 25th of November, 1863, and 24th of January, 1864; and of the latter of the 17th of August, 18th of November, and 18th of December, 1863. Such a delay could not have occurred without some one being in fault; and it is accounted for in this way,—either the plaintiffs did not authorize Messrs. Dalgetty & Co. to clear the ship, or, if they did, then the latter were backward in doing so. It appears to me that, from whatever of these causes the delay originated, it cannot be justified as against the underwriters. It is a fair inference, that, if the instructions contained in the letter of the 25th of August had been as explicit as the plaintiffs thought they were, and as they ought to have been, the ship would have been cleared and dispatched in November, 1863, instead of April, 1864; and in that way this very long delay was the fault of the plaintiffs themselves.

The captain was to blame for increasing the charges upon the

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ship by his own default and misconduct to a large amount, though, in the absence of the accounts, we cannot say how much. It may have been so large as to have increased the difficulty of clearing the ship, and so have contributed to the delay. He was also in fault for not acquainting his owners with the extent of damage. They complain in their letter to him of the 1st of December, 1863, that he had never sent them the surveys. The ship had either been actually aground, or from time to time taking the ground, from some day in May previous to the 22nd, when she first floated, until the 1st of July; and, her weight being of course very great, —her burthen being 1316 tons,—serious damage was probable. Accordingly, it appears by the survey of the 10th of July that she was "much strained fore and aft. Coat of mainmast seven inches down from its proper place; all the iron knees between decks strained." This appears to me to indicate the probability of damage to the frame-work of the ship: but it certainly appears that, though the captain wrote on the 17th of July (seven days after the survey), he gives his owners no idea of the effect of this survey; and their letters of the 24th of September, to him, and of the 25th to Messrs. Dalgetty & Co., shew that they had a very imperfect idea of what had happened, and they made no provision accordingly. The final survey at Port Chalmers of September 4th agrees with what one would expect from the first, recommending that the ship should proceed in ballast on the intended voyage, and that she should "be put in a dry-dock or patent-slip for further examination,"—not for repair, but for further examination. It strikes me that, as soon as it is made out that such a damaged vessel cannot be made a sea-worthy vessel for cargo without going into a dry-dock for examination, it becomes a case in which no delay can be justified, as against the underwriters, in procuring that examination.

It is only necessary to add, upon this part of the case, that the letter of the plaintiffs of the 24th of October, with directions to clear the ship, would be received the end of December, 1863, or beginning of January, 1864. I can find no excuse whatever for the delay between this time and the 14th of April, when the vessel sailed for Calcutta. In their January letter (18th), Messrs. Dalgetty & Co. make no reference to the ship starting. In their February

letter (16th), they only express their regret at having been blamed for the detention of the ship. In their March letter (18th), all they say is, "This vessel is still in port, discharging her coals; but we expect her to get away by the end of the month;" and she did sail on the 14th of April. There may have been some reason for this, so as to excuse the apparent neglect of Messrs. Dalgetty; but *that* would not excuse the delay as against the underwriters. When the assured has all the necessary information, he must abandon at once; and five days (though in a somewhat peculiar case) has been held too long an interval: *Hunt* v. *Royal Exchange Assurance Co.* (1) But he has a reasonable time for acquiring the information; and there must be no delay in doing so. It certainly appears to me, for the reasons given, that, in this case, the very long interval between the disaster and the abandonment is not properly accounted for; that the delay between September, 1863, and April, 1864, or some substantial part of it, was the fault of the plaintiffs or their agents; and that, in that way, the abandonment was out of time. I very much question whether in any case where the further survey of a damaged vessel is ordered, the assured can be guilty of unreasonable delay, and afterwards, if the survey leads to abandonment, excuse themselves by saying, "we did not contemplate, and had no reason to contemplate, abandonment" during the delay. I rather think not. But, in the present case, it appears to me that there was enough in the nature of the accident, and in the surveys at Port Chalmers, to prevent the plaintiffs from recovering for a total loss, if they were guilty of delay in ascertaining the real extent of damage. The foregoing conclusions are sufficient for the decision of this case, viz. first, that the alleged damage to the ship did not of itself constitute a total loss of the freight; and, secondly, that the owner has by unreasonable delay lost the opportunity of making it into a total loss.

The case has been so far considered with reference to the grounds discussed in argument. But, before concluding, I wish to add the following. I have endeavoured to shew that, in such a case as the present, an abandonment is not necessarily inoperative and therefore inapplicable. The conclusion arrived at may be a doubtful one. If it was clearly established that, in so peculiar a case as

(1) 5 M. & S. 47.

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this, the transaction was such as not to admit of abandonment at all, then another question would arise, viz. whether such a policy covered anything but an actual total loss of the freight by actual total loss of the ship. The judgment of the Court of Common Pleas puts the decision upon two alternatives, and this is one of them: and it may, I think, be well contended that, if there cannot be an abandonment, there cannot be a constructive total loss.

The conclusion may not appear to meet the justice of the case; but, if the matter is examined, it is accounted for by this, viz. that, under such a policy, there cannot be a partial loss. In the case of an insurance on ship or cargo, if there is damage to any extent, the assured may treat it as a partial loss and recover his damages, or he has the option (if the damage is sufficient) of converting the partial loss into a constructive total loss, by abandonment. But, in a policy on prospective freight, like this, where, when the risk terminates, there is no interest except in contract, the case is different. There cannot be a partial loss; and therefore it may be contended that there cannot be a turning of a partial loss into a constructive total loss, and that the policy only covers an actual total loss of freight by actual total loss of ship.

There is only one other matter which was particularly noticed during the argument, and I can hardly pass it over. Up to this time, the case has been considered as if the owner had only insured the freight, and there was no insurance on the ship. But it occurred to me that, as there was also an insurance on the ship in this case, and an abandonment of the ship to the underwriters, the abandonment of the ship, if sufficient, might have a bearing upon the case. It seems contrary to principle that what is done under one contract should affect the rights acquired under another distinct one; but the answer is given in the judgment of the Court below. The objection referred to is discussed in Phillips on Insurance, § 1649; and, after giving a full answer to it, and shewing what the rule was in England, from the cases on the subject, the learned author adds, § 1650,—"The fact that the underwriters on freight may be affected by the circumstance of the ship being insured and abandoned, is an irregularity in jurisprudence. The doctrine adopted in the United States is preferable, as it makes the irregularity less than it is under the English doctrine."

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In the present case, the only interest in freight which the owner possessed, was, the right to have cargo provided; and he was under a corresponding obligation to be at the port of loading to receive the cargo, subject, of course, to the usual exception of perils of the seas. Now, by abandoning to the underwriters on ship, he avails himself of this exception in the charterparty, and elects not to be bound to receive a cargo, and discharges himself from it; and, as he cannot transfer to the underwriters on ship any obligation to complete the voyage, it follows that the charterer has no person bound under the charterparty to take his cargo, and he is of course discharged from it himself. The consequence is, that the assured, by his own act of abandoning to the underwriters on ship, destroys the right which was his only interest in the subject-matter of insurance, freight; and, having done this for his own interest, and to complete his demand against the underwriters, and so destroyed the right to earn freight at all, can he come against the underwriters on freight upon their contract of indemnity? It is obvious that, in such a case, the interest in the freight being destroyed, there would be by the act of the owner nothing to abandon to the underwriters on freight. It certainly appears unreasonable that a man, who, in consequence of sea-damage, properly abandons the ship, should be prejudiced by doing so, as against the underwriters on freight. But it has been so adjudged. It is only necessary to refer to the case of *Scottish Insurance Co.* v. *Turner*. (1) In that case, the assured abandoned to the respective underwriters on ship and freight. The ship had been repaired, and proceeded on her voyage; and it was not known that the damage was such as to justify an abandonment, until after the arrival of the ship with her cargo on board at the port of discharge. The effect of the abandonment of the ship was to transfer to the underwriters not only the ship but all the freight; and the freight was thus lost, in consequence of the perils insured against, to the assured; and he brought his action in Scotland upon his insurance on freight; and the Court of Session held, with apparent reason, that he was entitled to recover, the real cause of the loss to him being the perils insured against, and the abandonment of the ship a proper act superinduced by those perils; and they thought it made no

(1) 1 Macq. 334.

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difference that the freight was earned by the captain, who became agent for the ship underwriters, as it was lost to the plaintiff. But the House of Lords reversed this decision, and held that the freight was lost to the assured by his own election in abandoning to the underwriters on ship, and not by the perils which caused that election, and that he could not recover.

If the loss of the freight in this case be regarded as the consequence of the owner's election to abandon the ship, then, if the abandonment of the freight at Calcutta was sufficient, so was the abandonment of the ship, and the latter may have had the effect of destroying the plaintiffs' right to recover. My Brother Lush in the course of the argument gave a conclusive answer to this objection, if the fact was as he supposed, viz., "that, at the time of the abandonment of the ship at Calcutta, the charter was gone, and there was no existing interest under it whatever."

I had rather considered the case generally as if the abandonment had taken place at Port Chalmers. At the same time, after the captain's letter from Calcutta before referred to, I do not see how the charter can be said to have been at an end. I know this view, founded upon the effect of the abandonment of the ship, finds no favour with my learned Brothers; and I therefore advance it with diffidence, and leave it with what has been already said. If the sufficiency of the abandonment had not been argued, it might have been necessary to consider it further, and I may add that, as soon as an admitted irregularity in jurisprudence is introduced, we must not be surprised if we are led to conclusions which are apparently unsatisfactory. But the reasons before given are those upon which I rely, and which lead me to the conclusion that there is no sufficient ground for reversing the judgment of the Court below, and that it ought to be affirmed.

COCKBURN, C.J. This was an action on a policy of insurance on freight to be earned by a ship named the *Sir William Eyre*, under a charterparty with one De Mattos, wherein the ship was described as then on a voyage to New Zealand, and whereby it was agreed that she was to sail to New Zealand with cargo for owners' benefit, and, having discharged, should proceed to Calcutta, and there load from the freighters a full and complete cargo, and proceed there-

with to London. The policy applied only to the chartered freight from Calcutta to London, and attached only on the preliminary voyage from London to New Zealand. It described the interest as "on homeward chartered freight," and the voyage insured as "from the Clyde to Southland, New Zealand, while there, and thence to Otago, New Zealand, and for thirty days in port there after arrival."

The ship arrived at Bluff Harbour, Southland, on the 23rd of April, 1863. Whilst there she took the ground and sustained damage, but was got off and floated on the 22nd of May. On the 29th of May, a violent gale coming on, she again grounded, and was not got afloat again till the 6th of June; and, before she could be got into the channel, she grounded a third time, and was not finally got off till the 1st of July. She then left for Port Chalmers, the port of Dunedin, where she arrived on the 4th of July. A survey was held on her at Bluff Harbour, and further surveys were held on her at Port Chalmers; and it was found that she had sustained much damage; but the extent of the damage could not be there ascertained, as it was necessary for that purpose that she should be taken into a dry-dock or put on a patent-slip, neither of which existed in New Zealand, or were to be found anywhere nearer than Port Sydney. In point of fact, as the sequel shewed, the amount of damage, though not sufficient to prevent the vessel, after having undergone partial repair at New Zealand, from proceeding in ballast on her voyage to Calcutta, was such as to necessitate such an amount of repair, in order to render her sea-worthy to carry cargo, as to warrant the owners, had they then been aware of the actual extent of the damage, in treating the loss as a constructive total one. There was nothing, however, in the extent of damage discovered at New Zealand to lead the master to apprehend that such was the state of the vessel. In a survey held on her at Bluff Harbour, dated the 27th of May, 1863, though the surveyors report that the vessel "has strained in some degree aft, and that the mainmast appears to have settled below its original standing about two inches," and recommend that, "as they are unable to ascertain if any damage is done to the vessel below water, she shall be re-surveyed and her bottom examined at the first convenient port she arrive at," they go on to state that, "so far as

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they can see, she has sustained no damage which will prevent her from proceeding on her voyage," and that they "are of opinion that she may with safety proceed to her final destination."

Further surveys were held on the ship at Port Chalmers on the 10th of July and the 25th and 29th of August. The surveyors having ascertained, as far as could be done, the injuries the vessel had sustained, while they recommend certain specified repairs, and further advise "that the vessel's topsides, decks, waterways, and stanchions shall be thoroughly caulked, and docked at the first port of arrival," expressly state that "on each survey they examined the pumps, and found that the ship was making but an inch of water per day;" and further, that, "divers having been under the ship's bottom, they found that on the starboard side only a narrow strip of copper about 4 feet long by 2 inches was wanting, that her stern had a little copper off, and that on her port side and bottom they found nothing whatever the matter except a narrow strip 2 inches wide and 14 feet long."

The cargo having in the meantime been discharged, a further survey was held on the 4th of September, 1863; and the surveyors, having as they state "had bilge-plank out on both sides in the hold abreast of the mainmast," while they recommend that certain things shall be done to the ship, and further that at the next port available at which the vessel may call she shall be put in a dry-dock or on a patent slip for further examination, and also that on such occasion certain other things shall be done, expressly declare that they "find the vessel perfectly tight, and have no hesitation in recommending the captain to proceed in ballast on his intended voyage as soon as the necessary repairs recommended have been completed."

On none of these surveys does the real state of the ship, as afterwards disclosed, appear to have been even surmised; and the recommendation that she should be put in a dry-dock or on a patent-slip at some future port, seems rather to have been suggested as a matter of proper precaution, to see if any other repairs should be necessary to make her perfectly sea-worthy and safe, than from any apprehension of extensive damage beyond that which had been already ascertained.

I see no reason to doubt that the master participated in this

view, and entertained a full belief of being able, after the repairs recommended by the surveyors had been effected at Port Chalmers, to prosecute his voyage and bring his cargo home, even though a further examination should be had at Calcutta, and further repairs might on such examination be found to be necessary.

The master would have proceeded to get the necessary repairs done, but found himself in difficulty from want of funds. The freight receivable in respect of the outward cargo was to be received by the master at New Zealand, and would have been sufficient to meet the ordinary expenses of the ship; but considerable expenses had been incurred in getting the ship off, on the different occasions when she took the ground at Bluff Harbour; and, in consequence of her detention there, it became necessary to hire a steamer to take on the passengers: and it further appears that numerous claims had been made by passengers who had come out in the ship as emigrants, on account of breaches of the provisions of the Passengers Act; and, legal proceedings having been instituted to enforce such claims, the master had found himself compelled, as matter of prudence, to compromise with the claimants, at a considerable sacrifice. Claims were also made by consignees of cargo, in respect of damage and short delivery, which the master was in like manner compelled to settle. Through the expenses thus incurred, not only were the proceeds received by the master in respect of freight exhausted, but considerable advances had been made to him by the plaintiffs' agents at Dunedin, Messrs. Dalgetty & Co., the consignees of the ship. Further funds being required for the repairs found by the surveyors to be necessary, Dalgetty & Co., being aware that the plaintiffs were not the owners but only the mortgagees of the ship, declined to advance the funds required to pay for these repairs and to clear the ship, without specific directions from the plaintiffs, and wrote to them to that effect by letter of the 17th of August. The master thereupon advertized for a loan of 2400*l.* on bottomry; but, finding it impossible to obtain it at lower interest than 65 per cent., he abandoned that course, and resolved to wait for instructions from home. The plaintiffs do not appear to have received the letter of Dalgetty & Co. till November. On the 25th of that month, they wrote them a strong letter of remonstrance and complaint on

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account of their not having advanced to the master the necessary funds, desiring them at once to do so, taking the master's draft on them for the amount. On receipt of this letter on the 16th of February, 1864, Dalgetty & Co. advanced the necessary funds to the master, amounting to 211*l.*, to pay for the repairs and release the ship, taking the master's draft on the plaintiffs, which was honoured in due course.

Here, again, I cannot doubt that the plaintiffs entertained the full expectation, which the communications of the master transmitting his protest and the surveys would be calculated to produce, that the ship, having been repaired at Port Chalmers, would proceed to complete her voyage, and, though possibly some further repairs might prove to be necessary at Calcutta, would bring the cargo from thence home according to the charter. Thus far, it does not appear to have occurred to any one to imagine that the ship had sustained such an amount of damage as would make her not worth the expense of repairing.

Funds having been furnished, the master proceeded to get the repairs done; and, so far as I can see, without any undue delay, though some time was consumed in getting the vessel cleared of coals which had been stored in her, the captain having let her out as a coal-hulk, with the view of turning her to some use and account for the benefit of his owners until funds should be found to enable the repairs to be done,—a proceeding which appears to me not to have been unreasonable or improper.

On the 16th of April, 1864, the necessary repairs having been completed, the *Sir William Eyre* left Port Chalmers and proceeded to Calcutta, and on her arrival there, was placed in a dry-dock, when it was discovered that the injuries she had sustained were far more extensive than the surveyors at New Zealand had supposed, and that it would cost more to repair her than it was worth while to lay out on her. This being communicated to the plaintiffs, notice of abandonment was forthwith given to the underwriters on the ship, and also to the defendants, the underwriters on freight.

The Court of Common Pleas has held that the plaintiffs are not entitled to recover, on the grounds,—1. that in order to recover as for a total loss on the insurance on freight, notice of abandonment was necessary,—2. that, though notice of abandonment was given

on the discovery of the state of the vessel at Calcutta, such notice was too late.

I find myself unable to concur in the view of the Court of Common Pleas on either of these points.

It is no doubt true that the rule that, in order to claim as for a constructive total loss, the assured must give notice of abandonment, applies to insurance on freight, as it does to insurance on ship or goods: but the rule, to whatever species of insurance it is applied, must always be subject to this limitation, that it attaches only where there is something of appreciable value, however small that value may be, to relinquish to the insurer. Thus, where goods are on board, and the ship becomes a constructive total loss, the ship-owner, in order to claim for a constructive total loss on freight, must abandon to the underwriters the right to hire another vessel and carry the cargo to its destination, and so earn the freight. But, where the interest to be made over to the insurer is of so shadowy and unsubstantial a character that it cannot be supposed that it could have been of any benefit whatever to the underwriters, or that the latter, as reasonable men, would have thought of availing themselves of it, so that for all practical purposes abandonment would have been a merely idle and useless formality, the assured ought not, in my opinion, to be tied down to the necessity of giving notice of it; especially in these times, when it is notorious that the practice of underwriters is never to accept the notice.

Now, it is difficult in the present case to discover any possible advantage which could have accrued to the insurer on freight from notice of abandonment. By the state to which the vessel had been reduced by sea-damage, the plaintiffs, not being bound to repair her, were released from the obligations of the charterparty; there being, in my opinion, an implied condition in such a charterparty that, if the ship, on her way to fetch the cargo, perishes, the owner is released from his obligation to fulfil his contract with the freighter; while, on the other hand, the latter, being bound only to load a cargo by the chartered ship, is under no obligation to accept another vessel. There was, therefore, no right or interest in the owners in respect of freight which they could abandon to the underwriters. The only effect of notice of abandonment under

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such circumstances would have been that the underwriters might, if so minded, have themselves chartered a ship and proposed to De Mattos to let them bring home the cargo, taking their chance of his accepting their offer, in preference to that of any one else. But I am clearly of opinion that so speculative and remote a possibility cannot afford a ground for holding notice of abandonment to be necessary in such a case. Moreover, we know that, in point of fact, De Mattos, to whom the vessel was chartered, was on the eve of insolvency, and that his agents at Calcutta would not have loaded a cargo on his account, even if less delay had occurred in the arrival of the *Sir William Eyre* at Calcutta. It is difficult to imagine that, the contract between the freighter and the ship-owner being at an end, and the underwriters on freight, who on notice of abandonment would have stood in the shoes of the owners, having no right whatever to call on the freighter to send cargo by another ship, the underwriters, even if notice of abandonment had been given them when first the ship arrived at Dunedin, would under such circumstances have engaged another ship at Calcutta in order to bring home the cargo and earn the freight, upon the empty speculation of a balance in their favour between the chartered freight and the actual freight, in case the freighter should find a cargo and suffer them to carry it.

It is, however, in my opinion, enough to say that, to necessitate notice of abandonment to the underwriter, there must be an actual, tangible, and appreciable right or interest, capable of being transferred; as, for instance, in the case of freight, where the cargo is already on board, and the ship-owner would have the right of sending it on to its destination in another ship, and so earning freight. But it is unnecessary to pursue this subject further, as the majority of the Court are of opinion, that, if notice of abandonment was necessary, sufficient notice was given.

The authorities on the subject of the time within which notice of abandonment must be given no doubt establish that, so soon as the circumstances which justify the treating the loss as constructively a total one are brought to the knowledge of the assured, notice of abandonment must be given without loss of time. And, if this be the full extent of the obligation of the assured, as I think it is, the requirement was in this instance satisfied, inasmuch as it is un-

doubted that the true condition of the ship was only first discovered on her being docked and examined at Calcutta, and that, as soon as the extent of damage, and of the repairs consequently necessary, was made known to the plaintiffs, they forthwith gave notice of abandonment to both underwriters on ship and freight.

The Court of Common Pleas have, however, engrafted on the general rule just referred to this further extension, viz. that, if the subject-matter of the insurance has sustained injury, and there is reason to believe that, on a more complete examination, the extent of damage may prove such as to entitle the assured to treat the case as one of total loss, such examination must be made at the earliest practicable moment; whereas, in this case, according to the view taken by the Court of Common Pleas, the final examination of the vessel was delayed for an unreasonable period.

It may be doubtful whether a delay in proceeding to such final examination occasioned by a bonâ fide endeavour to perform a further portion of the voyage, would be a delay which should deprive the assured of his right to abandon when the actual state of the vessel is afterwards discovered. But, accepting the rule as laid down by the Court of Common Pleas, I think it can only be applied to a case where the assured believes, or has reason to believe, in the existence of unascertained injury which may prove sufficient to warrant an abandonment, and contemplates the further examination of the vessel with a view to ascertain whether he may claim as for a constructive total loss.

Now, this essential element is wanting in the present case. The surveys to which I have referred lead, as has already been stated, satisfactorily to the conclusion that the recommendation that the vessel should undergo a further examination, had no reference to any expectation of the discovery of such further damage as would justify abandonment; and that such examination was contemplated only with the view of securing the sea-worthiness of the vessel for the homeward voyage. The conduct of the master in endeavouring to procure funds to repair and release the ship, and that of the assured in adopting the large outlay required to be made on her immediately after receiving the communication from the master transmitting the protest and surveys, equally shew that there was

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no expectation in their minds of the existence of ulterior damage sufficient to create a constructive total loss.

The decision of the Court of Common Pleas appears to me erroneous by reason of this distinction having been overlooked, or from its having been assumed that the possibility of claiming as for a constructive total loss, and of a further examination of the vessel with a view to that result, was present to the mind of the plaintiffs at the time of the delay complained of. I am of opinion that such was not the case, and that the circumstances were not such as to call upon the assured to make a further examination of the vessel with a view to ascertain whether a constructive total loss could be claimed for or not; and that, notice of abandonment having been given as soon as the true state of the vessel was ascertained and known, such notice, if any notice of abandonment was necessary, was sufficient.

I have dealt thus far with the two propositions on which the judgment of the Court of Common Pleas has proceeded. It has, however, been suggested that there is a further ground on which the plaintiffs' claim ought to be rejected, viz. that a shipowner who, having insured both ship and freight, abandons the ship to the underwriters on the ship, in order to claim for a constructive total loss, loses the right to claim on the policy on freight, inasmuch as by his own act he incapacitates himself from carrying on the cargo and so earning the freight. This position appears to me to be altogether untenable in principle, and one which would lead to very inconvenient consequences. If correct, it would obviously be applicable to a case where the cargo on which freight was to be earned was already on board. It would equally apply to a case where the ship was not insured, but the owner as a prudent man declined to repair. It would tend to put an end to policies on freight altogether, as, in every case of constructive total loss of the ship, the policy on freight would be inoperative unless the assured elected to repair the ship, which on the hypothesis he ought not as a prudent owner to do. But the conclusive answer appears to me to be, that, the ship having been incapacitated from earning the freight by the peril insured against, and the owner not being under any obligation to repair in order to earn the freight, but, on the contrary, as a prudent man, being justified in abandoning her, the

loss of the freight in such a case does not arise from the act of the party, but from the sea-peril insured against.

There being, then, so far as I am aware, no authority for this novel position,—I say novel, because, though there must have been numerous instances of policies on freight as well as on ship, in which the ship has been abandoned to the underwriters on ship, without the latter taking to the ship and earning the freight,—one has never heard of the underwriters on freight resisting the claim of the assured on that ground; and as it seems to me untenable in principle, I see no ground for adopting it.

I therefore think the decision of the Court of Common Pleas must be overruled, and the verdict entered for the plaintiffs.

LUSH, J. Two questions were argued before us in this case,—the one, whether notice of abandonment was necessary,—the other, whether, if so, it was given in reasonable time.

Having come to the conclusion satisfactory to my mind that no notice of abandonment was necessary, I do not propose to discuss the second question, nor to say more upon it than that I concur in the opinions of my learned Brethren, the majority of whom base their judgments on that ground.

The object and effect of a notice of abandonment are nowhere more clearly stated than in the judgment of Lord Abinger in *Roux* v. *Salvador*. (1) "If," said he, "in the progress of the voyage the subject of insurance becomes totally destroyed or annihilated, or if it be placed, by reason of the perils against which he insures, in such a position that *it is wholly out of the power of the assured*, or of *the underwriter*, to procure its arrival, he is bound by the very letter of the contract to pay the sum insured. But there are intermediate cases. There may be a capture, which, though primâ facie a total loss, may be followed by a re-capture, which would re-vest the property in the assured. There may be a forcible detention, which may speedily terminate, or may last so long as to end in the impossibility of bringing the ship or the goods to their destination. There may be some other peril which renders the ship unnavigable, without any hope of repair, or by which the goods are partly lost, or so damaged that they are not worth the

(1) 3 Bing. N. C. at p. 286.

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expense of bringing them, or what remains of them, to their destination. In all these or similar cases, if a prudent man not insured would decline any further expense in prosecuting an adventure the termination of which will probably never be successfully accomplished, a party insured may for his own benefit as well as that of the underwriter treat the case as one of a total loss, and demand the full sum insured. But, if he elects to do this, as the *thing insured* or a *portion* of it *still exists*, and is vested in him, the very principle of indemnity requires that he should make a cession of all his right to the recovery of it, and that, too, within a reasonable time after he receives the intelligence of the accident, that the underwriter may be entitled to all the benefit of what may still be of any value, and that he may if he pleases take measures at his own cost for realizing or increasing that value. In all these cases, not only the thing insured or part of it is supposed to exist in specie, but there is a possibility, however remote, of its arriving at the port of destination, or at least of its value being in some way affected by the measures that may be adopted for the recovery or preservation of it."

The subject of insurance in the present case is, the sum contracted to be paid by the charterer for the carriage of a cargo from Calcutta to Europe, and which cargo he engaged to ship on the arrival of the vessel at Calcutta in a fit condition to receive it. The risk undertaken was, sea-peril on the outward voyage to New Zealand.

It is an admitted fact in the case that the vessel did in the outward voyage to New Zealand receive such damage by sea-peril as necessitated repair to an amount exceeding her value when repaired, and that, upon the discovery of the extent of damage (which was not made for many months afterwards, nor until she arrived at Calcutta), the plaintiffs elected not to repair. That they had a right so to elect is not denied. It is clear that an owner is not under such circumstances bound to repair, in the interest either of the underwriters on ship or the underwriters on freight. As respects her capacity to earn freight, the ship was then as much lost to the owner as if she had sunk or broken up. That which, in the language of maritime commerce, constitutes the loss of a ship is, damage to an extent not worth repairing, followed by a

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determination not to repair. It is true that, if the ship is insured, the owner must, in order to recover for a total loss against that underwriter, give him notice of abandonment: but that is a duty springing out of that particular contract, or rather a condition of his right to claim the whole insurance. The underwriter on freight is entitled, in like circumstances, to an abandonment of that which he has insured, as a condition of his paying a total loss; but he has nothing to do with what remains of the ship. His obligation is the same, whether the ship is insured or not insured, or whether the owner, being insured, chooses to abandon the wreck and claim for a total loss, or to retain it and claim for a partial loss.

It was urged in the argument for the defendant that the election not to repair was deferred for an unreasonably long time, and that the owners might and ought to have ascertained the state of the vessel and made their election at an earlier period. If this argument were well founded, it appears to me that it would have no bearing on the case. What might have been the consequence, if the owners, with knowledge of the extent of damage, had delayed making up their minds whether or not they would repair till the time for loading had gone by, it is not necessary to inquire; for, as soon as they knew the extent of the damage, they made up their minds, and it is assumed in the case that, if at that time the ship had been sound, they might have claimed from the charterer the fulfilment of the charter. What benefit would the defendant have derived from an earlier decision? Suppose the plaintiffs had known of the extent of damage while the ship remained at Bluff Harbour, and had then elected not to repair. If there was nothing of the subject of insurance to abandon, the defendant's position would have been neither better nor worse than if the ship had sunk or gone to pieces in Bluff Harbour. He could not in that case have complained that no notice of the loss had been given him. However inconvenient or even prejudicial it may sometimes be to an underwriter not to receive early notice of a loss, the assured is under no obligation to give it. A notice of abandonment must be given within a reasonable time; but notice of loss is no part of the contract, either express or implied. If the underwriter wishes to have notice of a loss, he must stipulate for it in the policy.

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There being, then, what as regards her freight-earning quality was a total loss of the ship, the question is, did this loss, having regard to the state of things existing at the time when the owner elected not to repair, entail as a consequence a total loss of the chartered freight.

If the cargo had been on board, so that there was a possibility of earning the freight by sending it on by another vessel, the case would have admitted of other considerations. It is, however, needless to inquire whether, in the events which happened, the defendant would, in such case, have been entitled to notice of abandonment or not; for, no part of the cargo was on board. The ship was never in a condition to receive it; and for that reason the owner was never entitled to call upon the charterer to load. Under these circumstances, what was there at any time to abandon of the subject-matter of the insurance? No power of earning the chartered freight could have been thereby transferred by the assured to the defendant. Not being the underwriter on ship, he had no right to have her abandoned to him in order to repair her himself; nor could he have called upon the charterer to load his cargo in another ship of his providing. He could not by an abandonment have been subrogated into the place of the assured; for, he would not have had thereby either the ship or the charter,—either the means of earning or the right to earn the freight in question. It had, therefore, become impossible for either the assured or the underwriter to save the subject of insurance, or any part of it. The assured could not, unless he did repairs which he was not bound to do, and had decided not to do; and the underwriter could not, because he could not take the ship and repair her, nor compel the charterer to substitute another ship. The loss of freight, therefore, was total and absolute.

For these reasons, I am of opinion that the judgment of the Court below ought to be reversed.

KELLY, C.B. I have only to add, on behalf of my Brother Channell and myself, that, concurring as we do substantially in the judgment of the Lord Chief Justice, we also think that, supposing it doubtful whether, if no notice of abandonment of either ship or freight had been given, the underwriters upon freight would have

been liable, yet, inasmuch as notice of abandonment was in fact given to the underwriters upon the ship, and, as we are clearly of opinion, given in time, all that remained of the ship herself or the proceeds of the ship if she had been sold, belonged to the underwriters on the ship, and it became impossible for the owners to earn the chartered freight, of which, therefore, there was then an actual and not a constructive total loss.

With respect to the delay in the notice of abandonment, the cause of that delay having been the refusal of the plaintiffs' agents in New Zealand to supply the funds required to repair and clear the ship, which could not have been anticipated by the plaintiffs, who as soon as it became known to them instructed them to make the necessary advances, which were made accordingly, and the ship having sailed for Calcutta as soon as the repairs were completed, we think the delay satisfactorily accounted for, and the notice of abandonment in time.

Then, as to the cases of *Scottish Marine Insurance Company of Glasgow* v. *Turner* (1), and *Stewart* v. *Greenock Marine Insurance Co.* (2), upon the authority of which *Turner's Case* was decided, there the freight alleged to have been totally lost had been in fact earned; and the underwriters upon the ship, to whom the ship had been abandoned, had become entitled to it: whereas, the freight in the present case, being prospective chartered freight, never was and never could have been earned, and was as totally lost to the owners when the ship had passed to the underwriters upon the ship as if it had been actually sunk in the sea upon the voyage to New Zealand.

Judgment reversed.

Attorneys for plaintiffs: *Thomas & Hollams.*

Attorneys for defendant: *Field & Roscoe.*

(1) 1 Macq. 334. (2) 2 H. L. 159.

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Feb. 23.

GRANT *v.* GRANT.

Will—Evidence—Latent Ambiguity—Parol Evidence, Admissibility of—Nephew.

In an action of ejectment brought to try the right to freehold property under a devise by a testator, in the words "to my nephew Joseph Grant," parol evidence was offered to prove—

First, that the testator's own brother had a son named Joseph Grant, and that the testator's wife's brother also had a son of the same name;

Secondly, that the testator habitually called the latter his nephew both to his relations and to strangers;

Thirdly, that the latter was the person really intended in the will:—

Held, that the two first heads of evidence were admissible to shew the surrounding circumstances of the testator when making his will, and that either of them alone would have been sufficient to give rise to a latent ambiguity as to which of the two persons named Joseph Grant was intended by the testator; and that the third head of evidence was therefore also admissible.

THIS was an action of ejectment brought to recover possession of a dwelling house and other property in the parish of Rugby, and the following case was stated for the opinion of the Court by the order of Byles, J.:—

4. John Grant, the testator, in the will and the codicil thereto, hereinafter mentioned, before and at the time of the making thereof, and up to and at the time of his decease, was seised in fee simple of a messuage, dwelling house, buildings, and premises, situate in the parish of Rugby, in the county of Warwick (being the premises sought to be recovered in this action), wherein, before and at the time of his making of the will and codicil, he resided and continued to reside up to and at the time of his death, and which by the will are expressed to be devised under the words, "I devise to my said nephew Joseph Grant, his heirs and assigns, the said house and premises where I now live."

5. John Grant, the testator, on the 18th day of February, A.D. 1868, duly made and published his last will, and on the 21st day of February, A.D. 1868, duly made and published a certain codicil thereto, which will and codicil were respectively duly executed and attested according to law, and were respectively in the words and figures following (that is to say):—

"This is the last will and testament of me, John Grant, of

Rugby, in the county of Warwick, dealer in marine stores, as follows:—I direct the payment of my just debts, funeral expenses, and testamentary expenses. I bequeath to my niece Ann Liggins the sum of 300*l.* free of legacy duty, and I devise to my said niece Ann Liggins, her heirs and assigns, my house in Pennington Street, in Rugby aforesaid, in the occupation of — Hudson, and my house in Riley's Court, and my three houses in Gas Street, Rugby. I devise to my niece Mary Pettifer, her heirs and assigns, my five houses in New Bilton. I devise to my niece Emma Bench, her heirs and assigns, my house in Rugby in the occupation of — Preast, my house at Old Bilton in the occupation of — Pain, and my two remaining houses in Pennington Street in the occupation of Whitwell and Renshaw. *I bequeath to my nephew Joseph Grant the sum of* 500*l. and all the stock and household effects in the house where I now live, and I devise to my said nephew Joseph Grant, his heirs and assigns, the said house and premises where I now live.* I devise to my nephew James Grant, his heirs and assigns the house and premises in the Lawford Road in the occupation of Lissimer, the miller. I devise all other my real estate, if any, unto my said nephew Joseph Grant, his heirs and assigns. I bequeath all the residue of my personal estate unto my said nephew James Grant absolutely. I appoint my said nephew Joseph Grant executor of this my will. In witness whereof I have to this my last will and testament set my hand this 18th day of February, 1868.—John Grant. Signed by John Grant, the testator, as and for his last will and testament, in the presence of us, present at the same time, who, at his request, in his presence, and in the presence of each other, have subscribed our names as witnesses.—Richard King, surgeon, Royal Navy, Rugby; Frederick Fuller, solicitor, Rugby."

7. "This is a codicil to the last will and testament of me, John Grant, of Rugby, in the county of Warwick, dealer in marine stores, dated the 18th day of February, 1868:—I appoint my nephew James Grant an executor of my said will in conjunction with my nephew Joseph Grant, and I devise all estates vested in me as trustee or mortgagee unto the said Joseph Grant and James Grant, their heirs and assigns, subject to the equities affecting the same. In witness whereof I have to this codicil to my said will

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set my hand this 21st day of February, 1868.—John Grant. Signed by the said John Grant, the testator, as a codicil to his last will and testament, in the presence of us, present at the same time, who, at his request, in his presence, and in the presence of each other, have subscribed our names as witnesses.—Richard King, surgeon, Royal Navy; Frederick Fuller, solicitor, Rugby."

8. The testator died on the 22nd day of February, in the year of our Lord 1868, without having revoked or altered the will or codicil respectively, save so far as relates to the will by the said codicil.

9. The testator's eldest brother, William Grant, survived the testator, and was and is his heir at law.

10. The claimant, Joseph Grant, the plaintiff in this action, is a son of the testator's said brother William Grant, and is a lawful nephew of the said testator.

11. Ann Liggins, Mary Pettifer, and Emma Bench, by the testator respectively described as nieces in the will, are the daughters of the testator's brother Thomas Grant, and are respectively married.

12. James Grant, in the will and codicil respectively described by the testator as his nephew, is a son of the testator's brother Thomas Grant, and brother of Ann Liggins, Mary Pettifer, and Emma Bench.

13. No brother or sister of the testator, except the said brother William Grant, had a child named Joseph Grant.

14. The testator, at the time of his making of the will and codicil, and up to the time of his death, had neither child, grandchild, or other lineal descendant.

15. The testator, in or about the year 1838, married Jane Scott, widow, formerly Jane Grant, spinster, who was his first cousin, and the defendant, Joseph Grant, is the son of Joseph Grant, a brother of the testator's said wife.

16. The last-mentioned Joseph Grant, the father of the defendant, died about twenty-two years ago, leaving a widow and his son, the defendant, then a boy of three years old. The widow died about fifteen years ago, whereupon the testator took the defendant into his own house, and brought him up, and he lived as an inmate of the testator's house till the death of the testator,

and assisted him in the management of his business of a marine store dealer.

17. The testator's brother William, the father of the plaintiff, has a large family, of which the plaintiff is one of the younger children, and the testator had not been on good terms with or visited his said brother, who lived about twelve miles from the testator, for many years before his death. He did not know how many children his said brother had, and at the time he made his will did not know of the plaintiff's name or existence.

18. The testator was in the habit of calling the defendant his nephew both to the other members of the family and to persons not related to him, and the testator on several occasions expressed his intention of leaving his house and business to the defendant, and also on several occasions expressed his intention that neither his brother William nor the family of his brother William should have any of his property.

19. The will was prepared by Mr. Fuller, a solicitor at Rugby, who took his instructions from testator on his death-bed, and who did not know any of the testator's relations, except the Joseph Grant who lived with him, and in giving him instructions to prepare the will the testator said that it was his intention that neither his brother William nor any of his family should have anything, as he had lent both him and his elder sons money which he had not been repaid, and he considered they had had their share of his property in that way. He also told Mr. Fuller that he wished to give his nephew Joe his house in which the testator lived, his stock in trade, and 500*l.* to enable him to continue carrying on the business, and wished him to be his executor. Mr. Fuller asked the testator if by his nephew Joe he meant the person who lived with him and helped him in his business, and he said, "Yes; I mean him downstairs;" and he wished to give him the house and business, as he had lived so long with him, and helped him so much in his business. Mr. Fuller asked the testator if the person he called Joe was his nephew, and the testator replied that he was.

21. The defendant, Joseph Grant, is in possession of the messuage, dwelling house, outbuildings, and premises, the subject of this action of ejectment.

22. The Court was to be at liberty to draw inferences of fact which

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a jury ought to draw, and the facts stated in the 15th, 16th, 17th, 18th, and 19th paragraphs of this case were so stated, after protest by the plaintiff, that they should not have been inserted herein, and the question of the admissibility of the whole or any part of the facts in such paragraphs contained was reserved for the decision of the Court.

The question for the opinion of the Court was, whether the said Joseph Grant, the plaintiff, was entitled to the said messuage, dwelling house, and premises under the above devise.

Grove Chapman (*Quain, Q.C.*, with him), for the plaintiff, contended that the term nephew, having a primary sense which included only the son of an own brother or sister, the testator having only one such named Joseph Grant, there was no ambiguity in the expression in the will, and parol evidence was therefore not admissible to prove what were, in fact, the testator's intentions.

Field, Q.C. (*Wills* with him), for the defendant, contended that the word nephew had no strict legal signification, and was used in ordinary language to include the sons of brothers and sisters-in-law, as well as those of brothers and sisters, and that there was, therefore, a latent ambiguity in the will, which rendered parol evidence of the testator's real intentions admissible.

Grove Chapman, in reply.

Cur. adv. vult.

Feb. 23. The judgment of the Court (Bovill, C.J., Montague Smith, J., and Brett, J.) was delivered by

BOVILL, C.J. The question raised in this case has already been decided by Lord Penzance in the Probate Court (1) in favour of the defendant; but there is an appeal against his judgment, and the plaintiff has required the decison of this Court in the present action of ejectment, which affects the title to the real estate.

The determination of the question really depends upon the admissibility of and the effect to be given to the parol evidence; and this evidence is of two kinds, one class of evidence being offered for the purpose of shewing that there is in the will a latent ambiguity, and the other class for the purpose of explaining and removing it.

(1) Law Rep. 2 P. & M. 8.

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The devise of the testator was to "my nephew Joseph Grant;" and the point at issue is, whether these words apply to the plaintiff or to the defendant. The language of the will itself is clear, and free from ambiguity on the face of it; but, as in most cases of wills, parol evidence is necessary, and therefore admissible, to identify the party intended to be described, just in the same way as such evidence is admissible to identify and to shew what was the subject-matter devised.

The parol evidence to prove that the plaintiff was the son of a deceased brother of the testator, and therefore answered the description in the will, was clearly admissible; and it is equally competent for the defendant to endeavour to prove that the words of the will *may* also apply to him; and this can only be done by parol evidence, which is therefore admissible for that purpose.

In each case this kind of parol evidence is not admissible for the purpose of controlling, varying, or altering the written will of the testator, but is admitted simply for the purpose of enabling the Court to understand it, and to declare the intention of the testator according to the words in which that intention is expressed. If such evidence establishes that the description in the will may apply to each of two or more persons, then a latent ambiguity is exposed, and, rather than that the devise should fail altogether for uncertainty, the law allows the ambiguity which is exposed by the parol evidence to be cleared up and removed by similar evidence, provided such parol evidence is sufficient to enable the Court to ascertain the sense in which the testator employed the particular expression upon which the ambiguity arises. If the parol evidence, after exposing the latent ambiguity, fails to solve it, the Court cannot give effect to that part of the will. Thus, in *Thomas* v. *Thomas* (1), where the particular devise was, "to my granddaughter Mary Thomas, of Llechlloyd, in the parish of Merthyr," evidence was given that the testator had a grand-daughter of the name of Elinor Evans, who lived at Llechlloyd in Merthyr parish, and a great-granddaughter named Mary Thomas, who lived in the parish of Llangain, some miles from Merthyr parish. No other evidence being given, it was held that, although an ambiguity was raised, it was not solved, and therefore that the Court could not

(1) 6 T. R. 671.

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apply the devise, that it consequently failed, and that the subject-matter of the devise went to the heir at law. The plaintiff's evidence in the present case clearly brought him within the description in the will. The defendant's evidence proved that he was the son of a brother of the testator's wife, and, the testator having married his first cousin of the same name as himself, the defendant's name was the same as that of the plaintiff. Does, then, the defendant by this evidence shew that the description will apply to him. It is quite true that a son of a brother or a sister is generally called and known as a nephew; and this term, therefore, would no doubt apply to the plaintiff: but the word "nephew" has no definite legal signification; and there is not anything to limit its application to the precise relationship above described; on the contrary, there are many authorities to shew that it has been and may be used in a much wider sense, extending to persons in a different degree of relationship; and, in its ordinary and popular sense, it is frequently and commonly applied to other persons; for instance, it is commonly applied by a husband to the son of his wife's brother or sister, or by a wife to the son of her husband's brother or sister. The son of either of such brothers or sisters would commonly call the husband and wife his uncle and aunt; nor could it be said that, in popular and ordinary language, such a description would be unusual or inappropriate.

It is the Court which has to be satisfied that the description may apply to the defendant; and, if it rested on this evidence alone, we should be of opinion that the defendant had brought himself within the description of the will, so as to create a latent ambiguity, and to let in further parol evidence as to which of the two parties was intended to be described.

It is not necessary that the description in the will should be in all respects accurate or perfect; but it is enough if it satisfies the mind of the judge that there is a sufficient description with legal certainty: see V. C. Wigram's Treatise on Extrinsic Evidence, Prop. 7, par. 186: for example, where a testator devised to Mary, Elizabeth, and Ann, the three daughters of Mary Beynon, and at the date of the will Mary Beynon had two legitimate daughters and one illegitimate daughter, Elizabeth. Parol evidence was admitted to shew that Mary Beynon had formerly had a legitimate

daughter Elizabeth who died an infant; and, although it was considered that the legitimate daughter was primâ facie the person intended, the other facts and circumstances were left to the jury to say which of the two Elizabeths was the person intended to be described: *Doe* d. *Thomas* v. *Beynon.* (1)

The present case is also somewhat similar in principle to *Bennett* v. *Marshall* (2), where, a devise being "to my second cousin *William* Marshall," and the testator having no second cousin of that name, but having a first cousin once removed named *William* Marshall and a first cousin once removed named *William John Robert Blandford* Marshall, it was considered by the present Lord Chancellor that, as it was a common practice, where a person has several Christian names, to call him by the first of those names only, a sufficient case of ambiguity was made out to call for parol evidence in order to ascertain which of the two parties was intended. Upon such evidence, the decision in that case was in favour of the cousin with the several names; the Vice-Chancellor remarking that, if the evidence had been perfectly balanced, the cousin named William only would have been entitled to the preference. So, here, if the parol evidence were equally balanced, we might probably hold that the plaintiff would be entitled in preference to the defendant; but this cannot affect the question of the admissibility of the evidence. Another instance of effect being given to what was considered popular language used by a testator occurs in the case of *Doe* d. *Gains* v. *Rouse* (3), where the testator who had a wife Mary, to whom he was married in 1834, and who survived him, in 1840 went through the ceremony of marriage with a woman whose christian name was Caroline, and who continued to reside with him to the time of his death. By his will, he devised certain property to "my dear wife Caroline, her heirs, &c. absolutely:" and this Court held that Caroline took under this devise, notwithstanding the entire description was not applicable to her,—the description being sufficient in a popular sense.

But there is another ground upon which it appears to us that the defendant may endeavour to bring himself within the description in the will, viz., that the testator was *in the habit of calling*

(1) 12 Ad. & E. 431. (2) 2 K. & J. 740.

(3) 5 C. B. 422.

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him his nephew Joseph Grant. In all cases of wills, the surrounding circumstances as they existed at the time of the will, including the state of the testator's family and the nature of his property, may generally be proved in order to place the Court as nearly as possible in the same condition as the testator, so that they may understand the language of his will and apply it in the same sense in which he used it. We are of opinion that evidence may be given of a testator having been in the habit of using expressions in a particular sense; though, whether such evidence will affect the will, or its application, will depend upon the particular circumstances and the language of the demise in each case; and it would not generally be admissible to alter the natural meaning and legal effect and construction of the words, where they have a definite and clear meaning.

In *Richardson* v. *Watson* (1), where a question arose as to what was intended under a devise, *the close* in K., Lord Wensleydale said: "Generally speaking, evidence might be given to shew that the testator used the word 'close' in the sense which it bore in the county where the property was situate, as denoting a farm," though in the particular case it was held that such evidence was not admissible, because the other parts of the will shewed that the testator had used the expression in its ordinary sense, as denoting an inclosure only.

This subject was much considered by the Court of Exchequer in the case of *Doe* d. *Hiscocks* v. *Hiscocks* (2); and the following passage occurs in the judgment at p. 368: "Again, the testator may have habitually called certain persons or things by peculiar names by which they were not commonly known. If these names should occur in his will, they could only be explained and construed by the aid of evidence to shew the sense in which he used them, in like manner as if his will were written in cypher, or in a foreign language. The habits of the testator in these particulars must be receivable as evidence to explain the meaning of his will." In *Crosthwaite* v. *Dean* (3), where a devise was to Charlotte Lee, evidence was admitted by the present Lord Chancellor to shew that a person who originally bore that name, but had married a person

(1) 4 B. & Ad. 787, 799. (2) 5 M. & W. 363.
(3) Law Rep. 5 Eq. 245.

of the name of Antrim (from whom she was afterwards separated) was *habitually called* by the testator by her maiden name of Lee. In *Goodinge* v. *Goodinge* (1), where the demise was to certain *poor relations*, evidence was admitted of the testator having poor relations in Salop, *and that he knew thereof:* and Lord Hardwicke thus referred to another case,—"As where the testator described a legatee by a wrong name which she never bore, parol evidence was allowed by the Master of the Rolls to shew that the testator knew such a person, and used to call her by a nickname." In *Beachcroft* v. *Beachcroft* (2), the case thus referred to is said to be the case of *Beaumont* v. *Fell* (3), where the bequest was to Catharine Earnley, and a person named Gertrude Yardley claimed to be the person described, evidence was admitted to shew that the testator usually called Gertrude "Gatty," and that, whilst giving instructions for his will, he spoke in so feeble a voice that the attorney's clerk might easily have mistaken the names. In *Beachcroft* v. *Beachcroft* (4), the bequest was "to *my children* the sum of pounds sterling 5000 each." It was contended that this could apply only to legitimate children, and that, as the testator died unmarried, the legacy did not take effect. But evidence was admitted that the testator had illegitimate children born in India previous to the making of the will, that he was much attached to them, and had sent them to England to be educated. Upon this the Vice-Chancellor decreed that the legacies applied to them. He says: "If there is a latent ambiguity, evidence is admissible to shew whom the testator was in the habit of considering in the character described in the will."

Where it appeared on the face of the will itself that, in some parts of it, the testatrix had used the term "nieces" to describe her great nieces, a similar construction was placed upon the words nephews and nieces in another part of the same will, so as to include great nephews and nieces, though in that case it did not depend upon extrinsic evidence: *James* v. *Smith.* (5)

If, then, this head of evidence be admissible, as we think it is, it distinctly appears from the 18th paragraph of the case that the

(1) 2 Ves. sen. 231.
(2) 1 Madd. 430.
(3) 2 P. Wms. 141.
(4) 1 Madd. at p. 439.
(5) 14 Sim. 214.

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testator in this case was in the habit of calling the defendant his nephew; and, as his name was Joseph Grant, he would in this view also answer the description in the testator's will of "my nephew Joseph Grant."

The defendant has thus, as it seems to us, satisfactorily shewn that the words of the will may apply either to him or to the plaintiff; and then, as there is nothing in the will itself, or upon the evidence to which we have hitherto adverted, to shew which of them was the person intended to be described and to whom the testator intended the words to apply, the further parol evidence as to the testator's knowledge and other circumstances became admissible, and upon such of that evidence as was properly admissible, it is not disputed that the defendant was in fact the person intended to be described by the testator.

Under these circumstances, the parol evidence being admissible for the purposes and in the manner which we have pointed out, we think it exposed a latent ambiguity, and equally removed it, and enables us to understand the language of the will, and to apply it as the testator is clearly shewn to have intended, viz., in favour of the defendant.

This view is in accordance with the decision of Lord Penzance, and we give our judgment for the defendant.

Judgment for the defendant.

Attorneys for plaintiff: *Dubois & Maynard.*
Attorneys for defendant: *Fuller & Saltwell.*

END OF HILARY TERM, 1870.

CASES

DETERMINED BY THE

COURT OF COMMON PLEAS,

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF COMMON PLEAS,

IN AND AFTER

EASTER TERM, XXXIII VICTORIA.

SINCLAIR *v.* THE GREAT EASTERN RAILWAY COMPANY.

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May 6.

Practice—Payment into Court—Judgment-Debt—Interest under 1 *&* 2 *Vict. c.* 110, *s.* 17—*Entering Satisfaction.*

On the 9th of September, 1869, judgment was signed for 28,850*l.* (awarded by an arbitrator in a cause) and costs; on the 26th of October an order was made to stay proceedings until the fifth day of Michaelmas Term, to give the defendants an opportunity to move to set aside the award, they bringing the 28,850*l.* into court to abide the event; and on the 8th of November the motion was made, but no rule granted,—of which the plaintiff had notice.

Some delay occurred in the taxation of the plaintiff's costs, a review having been ordered at the plaintiff's instance, and the amount was not ultimately settled until the 29th of January, 1870; and on the 2nd of February the money was paid out of court to the plaintiff under a judge's order upon the defendants' summons, and the costs, with interest upon the judgment down to the 8th of November, 1869, were tendered to his attorneys. They, however, claimed interest down to the 2nd of February, 1870:—

Held, that the plaintiff was only entitled to interest down to the 8th of November, 1869, inasmuch as he might at any time after that day have taken the money out of court; and the Court ordered satisfaction to be entered on the roll.

THIS action was brought to recover the sum of 47,304*l.* 13*s.* 1*d.* alleged to be due from the defendants to the plaintiff on a balance of accounts. At the trial before Bovill, C.J., at the sittings in

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London after Hilary Term, 1869, a verdict was taken for the plaintiff, subject to an award, with power to the arbitrator to direct for what sum the verdict should stand. On the 31st of August the arbitrator made his award, finding for the plaintiff on all the issues, and awarding him damages amounting to 28,850*l.* On the 9th of September judgment was signed; and on the same day a summons was taken out for a stay of proceedings, to enable the defendants within the first four days of the succeeding Michaelmas Term to move to set aside the award. After several adjournments, an order was made on the 26th of October "that all proceedings in this action and upon the award be stayed until the fifth day of next Term, defendants bringing into court by Thursday the amount of the award: costs to abide the event of proceedings in court on motion." The sum of 28,850*l.* was accordingly paid into court on the 28th of October. On the 8th of November a motion was made to set aside the award or to remit it back to the arbitrator; but the rule was refused, of which the plaintiff's attorneys had notice. The plaintiff's bill of costs was delivered on the 18th of November, and on the 23rd of December an allocatur was given for 934*l.* 15*s.* 10*d.* In Hilary Term last a rule was obtained for a review of the taxation, and the review took place on the 29th of January, 1870.

On the 2nd of December, 1869, the defendants' attorney intimated to the plaintiff's attorneys that the money which had been paid into court to abide the result of the application to set aside the award lay there at the risk of their client, and that the defendants would refuse to pay interest after the date of the disposal of that application, and that they were ready and willing to do all things necessary on their part to enable the plaintiff to take the money out. On the 11th of January, 1870, a summons was served upon the plaintiff's attorneys, to set aside the judgment signed on the 9th of September, for irregularity; which summons came on for hearing before Willes, J., on the 14th, and was dismissed, with costs. On the 1st of February an order was made by a master of the court (upon a summons taken out by the defendants), directing that the 28,850*l.* should be paid out of court to the plaintiff or his attorneys, with interest to the 8th of November, in satisfaction pro tanto of the judgment; which was done; and on the same day the plaintiff's attorneys applied to the defendants for payment of

1672*l.* 8*s.* 9*d.*, the balance they claimed to be due to the plaintiff, and which balance included the plaintiff's costs as ultimately taxed, and 480*l.* 12*s.* 11*d.* for interest from the 9th of September, 1869, to the 2nd of February, 1870, upon 30,041*l.* 15*s.* 10*d.*, stated to be the amount of the judgment. The defendants intimated their willingness to pay interest upon the sum paid into court, from the day when the judgment was signed, viz. the 9th of September, 1869, till the day on which the rule to set aside the award was refused, viz. the 8th of November, and also interest on the taxed costs from the 9th of September, 1869, to the 2nd of February, 1870; but they denied their liability as to the rest. The plaintiff's attorneys declined to accept this.

On the 2nd of February, 1870, a summons was taken out calling upon the plaintiff to shew cause why further proceedings should not be stayed, on payment of 1403*l.* 14*s.* in satisfaction of the balance of the judgment-debt and interest; and on the 5th an order was made by Willes, J., in the terms of the summons. A long correspondence ensued between the attorneys for the respective parties; the defendants' attorney asserting that the 28,850*l.* had been at the plaintiff's disposal since the 9th of November, 1869, and the plaintiff's attorneys insisting that, as it was only paid in as collateral security, he had no control over it.

Sir J. Karslake, Q.C., obtained a rule calling on the plaintiff to shew cause why satisfaction should not be entered on the roll.

Sir G. Honyman, Q.C., and *Watkin Williams*, shewed cause. The 17th section of 1 & 2 Vict. c. 110, enacts that "every judgment debt shall carry interest at the rate of 4*l.* per cent. per annum from the time of entering up the judgment until the same shall be satisfied, and such interest may be levied under a writ of execution on such judgment." Under that section the plaintiff is entitled to interest upon the judgment-debt from the 9th of September, 1869, to the time when the money was paid out of court to him under the order of the master, viz. the 2nd of February, 1870. The deposit of the 28,850*l.* in court was no satisfaction of the judgment: it was there merely as a collateral security. The plaintiff had no control over it. Suppose the order of the 26th of October had been that the defendants, instead of paying money

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into court, should give security to the satisfaction of the master, would the giving of security have been any answer to the plaintiff's claim for interest under the statute? If not, the payment of the money into court could have no greater effect. A similar question was raised in *Stringer* v. *English and Scottish Marine Insurance Co.* (1) There, money had been paid in to a prize court to abide a decision; and, the officer having absconded with the money, the loss fell upon the party who paid it in.

Sir John Karslake, Q.C., and *Marriott*, in support of the rule. The plaintiff is only entitled to interest from the time of signing judgment until the 8th of November, when he had notice that the rule to set aside the award was refused, and he was entitled to take the 28,850*l.* out of court at once. The case of *Hews* v. *Pyke* (2) is precisely in point.

BOVILL, C.J. If the question had been whether, according to the strict technical rule of law, the judgment had been satisfied, I should have been disposed to say that it had not. But our decision does not depend on that. The statute 1 & 2 Vict. c. 110, s. 17, entitles the plaintiff to interest upon the judgment-debt until the judgment shall be satisfied. I therefore deal with the case as if the interest was a portion of the sum recovered by the judgment. A tender of the sum due would be no satisfaction. Even payment could not have been pleaded in bar to an action on the judgment before the statute of Anne. (3) But there may be circumstances which preclude a party from insisting upon his strict legal rights; and the Court has large powers to control its proceedings in matters connected with its practice. Even before the statute of Anne, the issuing of execution upon a judgment would not have been allowed after payment. So, the issuing of an execution after a tender of the amount due upon the judgment would have been held to be an abuse of the process of the Court, and would have been set aside, and the costs of the execution would have been disallowed. The question then is, whether what has happened here is not analogous to or stronger than a tender of the money. The 28,850*l.* awarded by the arbitrator was paid into court as the condition upon which time was granted to the defendants to move to set

(1) Reported on other points, Law Rep. 4 Q. B. 676.

(2) 1 Dowl. 322.

(3) 4 Anne, c. 16, s. 12.

aside the award. The plain understanding of the parties was, that the money was to be paid out to the plaintiff in the event of the motion being refused. A rule was applied for on the 8th of November, and was refused. There was nothing to prevent the plaintiff from at once obtaining the money. Indeed, it has not been suggested that there was any difficulty in his doing so. If the plaintiff's attorneys had issued execution for the full amount of the judgment, it is clear, according to the case of *Hews* v. *Pyke* (1), that the Court would not have sanctioned it. There, the defendant had paid into court the amount of the plaintiff's demand, with a further sum of 20*l.* as an additional security for the costs of the suit, pursuant to 7 & 8 Geo. 2, c. 71, s. 2, in lieu of perfecting special bail. The plaintiff recovered a verdict, taxed his costs, and issued execution for the whole amount of his damages and costs, without noticing the sum paid into court. The matter was referred to the master, who reported upon the principle that the plaintiff had no right to issue execution for the whole amount of damages and costs, but was bound to take the sum deposited out of court, and levy for the remainder only. There was an application to review the master's report: but the Court negatived it, saying: "The statute of the 43 Geo. 3, c. 14, and the 7 & 8 Geo. 4, c. 71, which were intended for the benefit of defendants subject to arrest, would effect a great hardship if a plaintiff might pass by the money paid into court, and issue execution for the whole sum recovered, and the costs. Suppose the case of a person arrested for 1000*l.*, he would be put to the inconvenience of raising that amount to pay into court, and, after verdict, of finding a like sum to meet the execution, or of suffering his goods to be sold by the sheriff, and afterwards of waiting until an order could be obtained to have the money paid to him out of court. To the plaintiff no hardship can accrue, as he can obtain the money out of court at any time, and would be entitled to the costs of taking it out. The just interpretation of the direction in the Act (2) that the sum deposited shall remain in court to abide the event of the suit, is, that the plaintiff, if he succeeds, shall not be *entitled* only, but *bound* to resort to that in the first instance, and can issue his execution for the surplus only." That decision proceeded upon the principle

(1) 1 Dowl. 322. (2) 7 & 8 Geo. 4, c. 71, s. 2.

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that, though technically right, what the plaintiff did was an abuse of the process of the court; and the case is the stronger, because it would require a motion to get the money out of court. In the present case, I cannot conceive what motive the plaintiff's attorneys could have had for refusing to take the money out. The master reports to us that, if he had taken out a summons for the purpose, he would have been allowed his costs. To abstain from making this rule absolute would, I think, be sanctioning an abuse of the proceedings of the court.

KEATING, J. I did not hear the whole of the argument: but I have heard enough to induce me to agree that the rule should be made absolute.

MONTAGUE SMITH, J. I am of the same opinion. The judgment was substantially satisfied by the payment of the money into court. The 28,850*l.* was allocated and appropriated to satisfaction of the judgment in the event of the rule to set aside the award being refused. The case is stronger than that of *Hews* v. *Pyke* (1), because the money was paid in after judgment signed. I am not quite clear that it might not have been pleaded, if an action had been brought upon the judgment. But it is unnecessary to decide that. It was a substantial satisfaction of the judgment pro tanto. The plaintiff might have received the money at any time after the refusal of the rule to set aside the award; and he had ample notice of the defendants' willingness to assent to his taking it out of court.

BRETT, J. I entertain some doubt whether the judgment could be said to have been satisfied on the 8th of November, or even on the 2nd of December. But, when I find that every facility had been offered to the plaintiff to obtain the money, I agree that the Court ought to exercise its equitable jurisdiction, and order the proceedings to be stayed, and satisfaction to be entered.

Rule absolute.

Attorneys for plaintiff: *Thomas & Hollams.*
Attorney for defendants: *W. H. Smith.*

(1) 1 Dowl. 322.

LEE AND ANOTHER *v.* THE SOUTHERN INSURANCE COMPANY. 1870

May 9.

Marine Insurance—Policy on Freight—Suing and Labouring Clause—Expense incurred to avert a Loss of Freight.

A ship with a cargo of palm-oil for Liverpool was stranded near Pwllheli, on the coast of Wales. It became necessary to land the cargo there, and this was properly done. The ship, after some temporary repair on the beach, was towed to Carnarvon, the nearest port, and repaired so as to be thoroughly sea-worthy for the completion of the voyage.

The oil was forwarded by railway to Liverpool, at a cost to the ship-owner of 212*l.* 15*s.* 1*d.*; and the freight was received by him.

The oil might have been kept at Pwllheli until the ship was repaired and then re-shipped at T., a place about seven miles from Pwllheli. This would have been a reasonable course to adopt, and would have cost the ship-owner 70*l.*

In an action against the insurers on freight:—

Held, that the ship-owner, having incurred expense for the purpose of averting a loss of freight, was entitled to recover, under the suing and labouring clause, so much thereof as was reasonably incurred; and that the proper measure was the sum it would have cost to re-ship the oil at T.

ACTION on a policy of insurance on freight, to recover expenses incurred in forwarding the goods in respect of which the freight was payable to their port of destination. The following case was stated under a judge's order, by consent, pursuant to the Common Law Procedure Act, 1852:—

1. The plaintiffs are insurance brokers in London. The defendants are an Insurance Company carrying on business in London.

2. On the 20th of November, 1867, the plaintiffs effected with the defendants, on behalf of the owners of the ship *Charles*, a policy in the sum of 600*l.* on the freight of the *Charles*, valued at 600*l.*; the voyage insured being at and from Cammeroons to Liverpool.

3. On the 26th of October, 1867, the *Charles* sailed from Cammeroons on the voyage insured, for Liverpool, with a cargo of palm-oil, consisting of about 500 casks; and in the course of her voyage she encountered bad weather off the coast of Ireland; and, after having sustained considerable damage, she was stranded on the 18th of January, 1868, on the Welsh Coast, near Pwllheli, and drifted on to the beach.

4. When intelligence of the disaster which the *Charles* had met with reached Liverpool, one Johnson was sent by the plaintiffs to

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the place where the ship was stranded, with directions to take such steps as to forwarding the cargo as might appear to him advisable for the interests of all parties, after consulting with the surveyors and persons he might find there acting on behalf of the underwriters on and owners of the cargo.

5. Johnson accordingly proceeded to Pwllheli, and a survey was held on the *Charles*. The surveyors recommended, for the interests of all concerned, that the cargo should be discharged at once, and that an attempt should be made at the next spring tides to get her off.

6. The place where the vessel so lay stranded was within 500 yards of the railway-station.

7. After consultation with the surveyors and the representatives of the underwriters on and owners of the cargo, Johnson, with the assent and approval of such representatives on behalf of the persons whom they respectively represented, resolved to have the cargo discharged and to forward it by rail from Pwllheli to Liverpool. The cargo was accordingly discharged and forwarded by rail to Liverpool. The total expense of forwarding the cargo by rail to Liverpool amounted to 212*l.* 15*s.* 1*d.*

8. There was no direct telegraphic communication between Pwllheli and Liverpool; and it would not have been prudent to delay discharging the cargo until after communicating with Liverpool.

9. The entire freight in respect of the cargo on board the *Charles* amounted to 607*l.*, of which 52*l.* had been paid in advance, leaving a balance of 555*l.*; and this balance was paid to the owners of the ship by the owners of the cargo, on the delivery of the cargo to them.

10. After the cargo had been discharged the *Charles* was temporarily repaired on the beach, and on the 3rd of February towed to Carnarvon, and there repaired so as to be thoroughly sea-worthy for the completion of the voyage.

11. No warehouses exist at Pwllheli for the storage of goods; but there are two courses which it would have been possible to adopt, had it been determined to store the oil at that place. One course would have been to store it in some twenty various places about the town; or two or three barns near the town might perhaps have

been obtained for the purpose. The other course would have been to store the casks in a field near the railway station, where they might have been stacked; but it would have been necessary to have them constantly watched. The cost of warehousing in the former way would have been about 9*l.* a week. The cost of watching, if the latter course had been adopted, would have been about 1*l.* a week.

12. The harbour at Pwllheli, though suited for small coasting vessels, is not fitted for a vessel of the size of the *Charles;* and it would not have been possible to have re-shipped the cargo on board her at Pwllheli, excepting by beaching her. This could only have been done during continuous fine weather; and a vessel coming from Carnarvon might have had to wait a very considerable time before meeting with suitable weather. Even in such weather, it would have been a dangerous operation to have loaded the whole cargo whilst the ship was so beached. The only anchorage ground near Pwllheli is at a place called St. Tidswell's Roads. The anchorage there is not a very safe one; and, in order to re-ship the cargo, it must have been taken in lighters a distance of about seven miles.

13. It would have cost about 30*l.* to re-ship the cargo, if the ship had been beached. If taken in lighters to St. Tidswell's Roads, the cost would have been about 70*l.*

14. There are warehouses at Carnarvon where the oil could have been stored. The cost of carriage to Carnarvon would have been considerably less than to Liverpool.

15. No estimate has been made by the plaintiffs of the cost of adopting either of the above modes of storing or re-shipping the cargo; but they claimed from the defendants 152*l.* 15*s.* 1*d.*, the estimated cost of forwarding the cargo to Liverpool, if it had been sent by sea instead of by rail. The sums mentioned in paragraphs 11 and 13 have been fixed approximately only, from the materials before the arbitrator.

16. The defendants have paid into court sufficient to cover all claims of the plaintiffs under the policy, except in respect of the dealings with the cargo after it was landed at Pwllheli. The Court was to be at liberty to draw all such inferences of fact as a jury would be justified in drawing.

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The question for the opinion of the Court was, whether the defendants were liable under the policy to pay to the plaintiffs the said sum of 152*l.* 15*s.* 1*d.*, or any and what part thereof.

May 2. *Cohen*, for the plaintiffs. It will scarcely be denied that, where the goods are severed from the ship, the expenses incurred in re-shipping them, whether into the same or another vessel, if proper and necessary, are recoverable against the underwriters on freight, under the suing and labouring clause: *Kidston* v. *Empire, &c., Co.* (1) The rule is, that the expenses of discharging the cargo are charges on general average; the expenses of warehousing are charges on cargo; and the expenses of re-shipping are charges on freight. If, therefore, the oil in question had been re-shipped, the expenses thus incurred would have been properly chargeable upon the underwriters on freight: *Le Cheminant* v. *Pearson* (2); Arnould on Shipping, 3rd ed. 729: and the measure of damages would be the expenses actually incurred: *Cory* v. *Thames Iron Works, &c., Co.* (3) No doubt, the master might have retained the goods until he could get the ship repaired, and then have re-shipped them: 2 Phillips on Insurance, § 1451. But the case finds that great inconvenience and risk would have been incurred in so doing; and the question is whether the master has not taken the best course for the benefit of all concerned. It may be said that the oil might have been forwarded to Liverpool in a less expensive way. But that, at all events, is no answer to the plaintiffs' claim for the 70*l.* which it is found it would have cost to re-ship the oil by means of lighters at St. Tidswell's Roads. Where a ship is so damaged as to require to be put into a dry dock, and the misfortune happens at a place where no such accommodation exists, the expense of taking her to a port where she can be docked and repaired is always allowed. Suppose the master takes her to a more distant port than he need have gone to for that purpose, could it be said that the assured was entitled to recover nothing?

[BOVILL, C.J. The difficulty here arises from the fact of the goods not having been re-shipped. Is there any distinction to be

(1) Law Rep. 1 C. P. 535: in error, Law Rep. 2 C. P. 357.

(2) 4 Taunt. 367.

(3) Law Rep. 3 Q. B. 181.

(1) 12 Jur. N.S. 665

found in the books between forwarding the goods to their destination by ships or in lighters or carts? The stranding might have taken place at the mouth of the Mersey; and a portion of the goods might necessarily have been forwarded to Liverpool by land. What would have been the liability of the defendants in that case?]

In 2 Parsons on Marine Insurance, 155, it is said: "It is the duty of the master to tranship the goods, or send them on *even by land carriage*, if he can with reasonable endeavours; if he fail to do this, and a total loss ensues, this is a loss by the misconduct of the master; and, if the insurers have insured against that, they are answerable." In 2 Phillips on Insurance, § 1441, it is said that, where, in consequence of a peril insured against, the goods cannot be carried to their port of destination in the original ship, the loss is the expense of forwarding them by another vessel; citing *Searle* v. *Scovel* (1), and *American Insurance Co.* v. *Center* (2); "and there seems to be no doubt that the loss must be so settled, as a salvage loss." And in § 1442 it is said: "The same rule is adopted where the goods are forwarded by land;" citing *Bork* v. *Norton.* (3) And the learned author adds: "In a case submitted to the author and others, the ship was wrecked at a place where the goods could not be re-shipped, and it was necessary to transport them by land to a port of re-shipment. It was decided that the expense of saving and storing the cargo was a charge on the goods, but that of transporting it to the port of re-shipment was a charge on the freight, being a part of the expense of forwarding the goods to the port of destination."

May 9. *Sir G. Honyman, Q.C.* (*Watkin Williams* with him), for the defendants. The expenses here claimed never were incurred at all; and, if they were, they were incurred solely for the benefit of the owner of the goods.

[BOVILL, C.J. The freight has been earned. A loss has been averted by the course adopted.]

The plaintiffs, if entitled to recover at all, can only do so by

(1) 4 Johns. Ch. R. 218. (2) 4 Wend. 45.
(3) 2 M'Lean's C. C. (U.S.) R. 422.

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virtue of the suing and labouring clause; and, the goods not having been re-shipped, they have incurred no expense which is recoverable under that clause. In *Kidston* v. *Empire, &c., Co.* (1), the ship was virtually lost, and the money was expended for the purpose of enabling the owner to earn the freight. Here the ship was repaired, and the goods might have been re-shipped without incurring any extraordinary risk. The only consequence of not sending them on by rail would have been a short delay in the receipt of the freight. Delay is not one of those things against which underwriters insure: *Everth* v. *Smith* (2); *Mordy* v. *Jones* (3); *Philpott* v. *Swann.* (4) To entitle the assured to recover under the suing and labouring clause, the expense must have been incurred for the purpose of averting a loss for which the underwriters are liable: *Great Indian, &c., Ry. Co.* v. *Saunders* (5); *Booth* v. *Gair.* (6) What the master here did might have been a prudent thing to do; but it was not done for the purpose of averting a loss which would otherwise have fallen upon the underwriters. Not having re-shipped the goods, the assured cannot recover against the underwriters on freight the sum which it would have cost to do so. The money paid for the transport of the goods was not paid for the purpose of earning the freight: and it is left ambiguous on the facts whether the payment was made by or on account of the ship-owners or of the owners of the goods.

Cohen was heard in reply.

BOVILL, C.J. In deciding this case, the Court is called upon to draw inferences of fact. It appears from the special case that the ship *Charles* was stranded on the Welsh coast on the 18th of January, 1868, and was got off on the 3rd of February. Judging from the statements submitted to us, and particularly from the fact of her having been got off so soon, I come to the conclusion that she was in such a condition that she might have been repaired

(1) Law Rep. 1 C. P. 535: in error, Law Rep. 2 C. P. 357.
(2) 2 M. & Sel. 278.
(3) 4 B. & C. 394.
(4) 11 C. B. (N.S.) 270; 30 L. J. (C.P.) 358.
(5) 1 B. & S. 41; 30 L. J. (Q.B.) 218: in error, 2 B. & S. 266; 31 L. J. (Q.B.) 206.
(6) 15 C. B. (N.S.) 291; 33 L. J. (C.P.) 99.

7 Jur. N.S. 1290
(4) S.C. 12 Jur. N.S. 665
(5) S.C. 7 Jur. N.S. 823, 9 Jur. N.S. 798.

and might have pursued her voyage to its termination. I also come to the conclusion that it was necessary and proper that the cargo should be discharged; and that, after no very considerable delay, it might, when the ship had been repaired, have been re-shipped at St. Tidswell's Roads, and carried on to Liverpool, and so the freight might have been earned by an expenditure of 70*l.*, which would have been the cost of carrying the oil in lighters from the place where it lay to St. Tidswell's Roads, and there put on board; and that that would have been a reasonable mode of re-shipment and of earning the freight. Under these circumstances, I am of opinion that the plaintiffs are entitled to recover against the underwriters on freight this sum of 70*l.* The course which was adopted was, sending the oil on to Liverpool by railway; and I infer that that was done by the agent of the ship-owner, that the expense of so sending it on was defrayed by him, and that the ship-owner by that means received the balance due to him for freight, after giving credit for a sum which had been paid in advance. The ship-owner, therefore, obtained the freight by forwarding the goods to their destination; and the owner of the goods received the goods under the contract of carriage. The freight was earned; and a loss of the freight was averted by an extraordinary expenditure incurred, not by the owner of the goods, nor by the ship-owner for the purpose of the ship, but for the purpose of obtaining payment of the freight, and for no other purpose. I have felt some hesitation and difficulty, from the vague and unsatisfactory statements in the case. But, having to draw conclusions of fact from them, these are the inferences which, after the best consideration I can bring to the matter, I feel compelled to draw. It seems to me that it was necessary to incur expense for the purpose of earning the freight; but that the whole of the expense actually incurred (212*l.* 15*s.* 1*d.*) was not properly incurred. The inference which I draw from the facts stated is, that 70*l.* is the proper measure of the liability of the underwriters on freight. That, it is found, would have been the cost of carrying the oil in lighters to St. Tidswell's Roads and there reloading it on board the *Charles*. It is true that the plaintiffs did not actually incur expense for that purpose; but they incurred a much larger expense in forwarding the goods and earning the freight; and,

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upon the whole, I am of opinion that 70*l.* is the sum which they are entitled to recover.

KEATING, J. I am of the same opinion. I am unable to draw from the statements in this case any other inferences than those stated by my Lord. The result is, that, in my judgment, the plaintiffs are entitled to recover 70*l.* The freight, no doubt, was earned, and was paid; but it was earned by means of an extraordinary expenditure. It was not denied by Sir George Honyman, that, supposing the goods had been transhipped on board another vessel, or reshipped on board the *Charles*, in either of the ways mentioned in the case, the expense of so doing would have been an expense which would properly fall upon the underwriters on freight. All he says is, that that course was not adopted, and that the plaintiffs cannot recover under the suing and labouring clause, because the expense was not incurred to avert an impending loss of freight. That, however, is immaterial in this case, because it is admitted that an expenditure much exceeding 70*l.* was incurred for the purpose of earning the freight. I see no reason why the cost of putting the oil on board by means of lighters at St. Tidswell's Roads should not be considered the fair measure of the plaintiffs' claim. The expense which was actually incurred may in one view of the case be said to have been reasonably incurred; but not as against the underwriters on freight. They have guaranteed the earning of freight only by the ordinary means. They are not to be placed in a different position by reason of extraordinary means having been unnecessarily resorted to for the purpose of earning it.

MONTAGUE SMITH, J. I am of the same opinion. The facts which I infer from the statements in the special case are, that, the ship *Charles* having been stranded on the Welsh coast, it became necessary to land the oil and store it; that the ship was obliged to go to Carnarvon for the purpose of repair, whence she might have gone back and re-loaded the oil; but that, to perform that operation, it would have been necessary to incur the expense of carrying the oil in lighters a distance of about seven miles, which, it is found, would have amounted to 70*l.* I think the plaintiffs are

entitled to recover that sum, but no more. It was contended on their behalf that it was, under the circumstances, a reasonable thing to send the goods on at once by rail from Pwllheli to Liverpool, and not to wait for the repair of the ship. Upon the facts stated, however, it seems to me that, in order to earn this freight, it was not necessary to tranship the goods; for, it is clear that the *Charles* might within a reasonable time have come back to a safe distance, where the goods might have been reshipped. The underwriters, therefore, are not liable under the suing and labouring clause for the expense of sending the goods forward by railway. It may be that the owner of the goods might have preferred paying the additional expense, for the sake of speed. But there is nothing in the case to shew such a state of things as to make it unreasonable for the ship, after having been repaired, to come back to St. Tidswell's Roads and take the goods on board again. And, although the expense of re-shipment was not actually incurred, I think the plaintiffs are entitled to recover the 70*l.*, which was an expense that must have been incurred by the ship-owner in order to avert a total loss of the freight. The case seems to me to fall within the principle laid down in *Kidston* v. *Empire, &c., Co.* (1) We are, no doubt, giving the plaintiffs a sum of 70*l.* for that which they have not specifically done. But, in order to earn the freight, it was necessary for them to carry the goods to Liverpool. They were by a peril insured against prevented from carrying them on at once by their own ship. Still, however, they were bound to forward them if they could. They might have done this by detaining them until their own ship was repaired, and then re-shipping them. Instead of doing so, they thought fit to forward them by railway. Was it necessary for them to go through the ceremony of repairing the ship and bringing her back to Pwllheli for that purpose? I think not. It is found that the smallest reasonable expense,—that of re-shipping the goods by means of lighters,—would have amounted to 70*l.*; and I think the plaintiffs have not disentitled themselves to claim that sum, by having adopted a more expeditious and expensive course.

BRETT, J. I am of the same opinion. The inference I draw

(1) Law Rep. 1 C. P. 535: in error, Law Rep. 2 C. P. 357.

12 Jur. N. S. 665

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from the facts stated in the case is, that the plaintiffs paid the expenses of transit by railway for the purpose of earning the freight. If the payment had been made for the owner of the goods, that fact would no doubt have been stated in the case. I also infer from the case that, without some expenditure, the freight could not have been earned at all. The expense, however, which was incurred was not the least onerous to the owners of the goods that might have been incurred. I think Mr. Cohen has failed to make out that the circumstances were such as to justify the sending the oil on to Liverpool by railway. The case finds that there was a less expensive course which the master might have adopted, viz. to repair the ship and take her back to St. Tidswell's Roads, and there re-ship the oil by means of lighters. This, it seems, could have been done for 70*l.* The plaintiffs having incurred expense in order to avert a loss of the freight, I think the underwriters on freight are liable, on their contract of indemnity, to repay them the amount which was properly and reasonably incurred; and therefore I think the plaintiffs are, under the circumstances, entitled to recover the less onerous amount, viz. 70*l.*

Judgment for the plaintiffs for 70*l.*

Attorneys for plaintiffs: *Field, Roscoe, & Co., for Bateson, Robinson, & Morris, Liverpool.*

Attorneys for defendants: *Thomas & Hollams.*

HUGHES, PETITIONER; MEYRICK, RESPONDENT. 1870 *May* 11.

Parliamentary Elections Act, 1868 (31 & 32 *Vict. c.* 125)—*Taxation of Costs —Preliminary Expenses—Preparation and Delivery of Briefs—Issuing Subpœnas.*

Upon taxation of the respondent's costs of an election petition, the time prescribed for the delivery of particulars of the alleged bribery, &c., under the rules of Michaelmas Term, 1868, is not to be treated as analogous to the notice of trial in an ordinary action.

On the 14th of December, 1868, a petition was presented against the return of the respondent for the borough of Pembroke, charging bribery, treating, and undue influence; and, on the 26th of February, 1869, notice was given that the trial would take place on the 1st of April,—Thursday in Easter week. On the 22nd of March, an order was obtained for the delivery of particulars of the acts of bribery, &c., intended to be relied on; and, on the 29th, the petitioner gave notice of an application for leave to withdraw his petition. The respondent's briefs were delivered on the 23rd and 27th of March; and several subpœnas were issued before the commencement of the Easter holidays.

On taxation of the respondent's costs, the master disallowed the expenses of the subpœnas and the fees paid to counsel; and he also substantially disallowed the costs of drawing and copying the briefs, and all the expenses of preliminary inquiries, conceiving that, by analogy to the rule which precludes the allowance of costs of preparing for trial before notice of trial given in an ordinary action, these expenses had been prematurely incurred:—

The Court ordered a review of the taxation.

THE petition against the return of the respondent as member for the borough of Pembroke was served on the 14th of December, 1868, charging bribery, treating, and undue influence. On the 26th of February, 1869, notice was given that the petition would be tried at Pembroke on the 1st of April, being the Thursday in Easter week. On the 22nd of March, the respondent obtained an order that the petitioner should three days before the day appointed for the trial leave with the master, and also give to the respondent, or his agents, particulars in writing of all persons alleged to have been bribed, of all persons alleged to have been treated, and of all persons alleged to have been unduly influenced before, during, and after the election, and that no evidence should be given by the petitioner of any objection not specified in such particulars, except by leave of a judge. No particulars were delivered in pursuance of that order; but, on the 29th of March, being Monday in Easter week, between 5 and 6 P.M., a notice was served at the office

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of the respondent's agents, that the petitioner intended to apply for leave to withdraw his petition, on the ground that the evidence which he had been able to obtain in support of it was not sufficiently strong to justify his further prosecuting it; and, on the 5th of April, an order was made by Martin, B., that the petitioner should be at liberty to withdraw the petition, and that he should pay the respondent's costs.

The briefs on the part of the respondent were delivered to the junior counsel on the 23rd of March, and at the chambers of the leader, who was then on circuit, on the 27th, together with their respective fees; the respondent's agents having then no reason to suppose that any application would be made for leave to withdraw the petition.

On taxation of the costs, the respondent's bill was reduced from 918*l.* to 63*l.* 6*s.* 6*d.* It contained, amongst others, a charge for "Instructions for brief" amounting to 367*l.* 10*s.*, which included a considerable sum paid for the expenses of several persons employed to collect evidence to rebut the charges contained in the petition, throughout the several townships or districts included within the borough of Pembroke,—a charge of 8*l.* 4*s.* for the journey of the respondent's agent to Pembroke for the like purpose,—a charge of 29*l.* 6*s.* 8*d.* for drawing the brief, 29*l.* 6*s.* 8*d.* for two copies for counsel, and 14*l.* 13*s.* 4*d.* for a copy for use,—and a charge of 210*l.* for the fee paid to the senior counsel, and 105*l.* to the junior. All these charges were disallowed, with the exception of 31*l.* 10*s.*

In consequence of the offices of the court being closed on the Monday and Tuesday in Easter week, it was thought necessary to obtain during the previous week such a number of subpœnas for witnesses, as, regard being had to the extent of the constituency (nearly 3000 voters) and the general nature of the allegations contained in the petition, would probably be required; otherwise it might have been difficult to secure their attendance at all. These also, and the payments made to two witnesses, were disallowed.

April 27. *Mellish, Q.C.*, obtained a rule to shew cause why the master should not review his taxation, 1. As to the disallowance of instructions for brief; 2. Of charges for briefs; 3. Of fees to counsel with their briefs, and charges for attendance therewith;

4. Of the cost of issuing subpœnas, and the service of some of them.

H. James, Q.C., shewed cause. The particulars delivered under the rule of court of Michaelmas Term, 1868, r. 6, are very analogous to particulars in an ordinary action at law. Until they are delivered, the petition containing mere general allegations, the respondent has no means of knowing what is the nature of the charges intended to be brought against him, and therefore cannot usefully incur expense in getting up evidence. For this the petitioner is not responsible, the form of petition being prescribed by the rule: see *Beal* v. *Smith* (1); and, if the respondent's agent chooses to prepare himself beforehand to meet every case which may by possibility arise, he cannot be justified in imposing all that expense upon the petitioner.

[BOVILL, C.J. In disallowing some of these expenses, the master seems to have thought that the rule which prevails as to the preparing and delivery of briefs in an ordinary action is applicable to these cases, and that the delivery of the particulars under the rule is equivalent to a notice of trial. In this he was clearly wrong. The respondent's agent is not to act recklessly, in employing a great number of persons to make general inquiries which may turn out to be useless, or in subpœnaing an extravagant number of witnesses before he knows the precise case which he has to meet. But, if the petition charges bribery, is it not essential that he should ascertain what agents were employed at the election, and should learn from them whether or not there is any foundation for the charge? So, as to treating and undue influence. Under the old practice before election committees, where no particulars were given, the counsel for the sitting member was always furnished with a brief. Was not that charged for and allowed? The three days fixed for the delivery of particulars under the rules of Michaelmas Term, 1868, were determined on by the judges who framed those rules, after much consideration, but without any reference to the preparation for defence or the delivery of briefs.]

If any injustice is likely to arise by reason of the shortness of the notice, the respondent may apply for a postponement of the trial. If the master proceeded, as it is suggested he did, upon

(1) Law Rep. 4 C. P. 145.

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the notion that the particulars in these cases are analogus to the notice of trial in an ordinary action, it cannot be denied that he has taken an erroneous view of the matter. But, if he has exercised his discretion as to the amount which ought to be allowed, the Court will not interfere. There was nothing exceptional in this case, to justify the delivery of the briefs so long before the day appointed for the trial. It was for the master to determine what was a reasonable time.

[BOVILL, C.J. I do not think it unreasonable that the briefs should be delivered a week before the day appointed for the trial of the petition; and, if the master has decided, as matter of discretion, that a brief delivered on Saturday, the trial being fixed for the following Thursday, was too soon, I have no hesitation in saying that his discretion has not been properly exercised.]

Mellish, Q.C., and *Harington*, for the respondent, were not called on.

BOVILL, C.J. The legislature has declared that the costs of an election petition are to be taxed on the same principles as costs between attorney and client in a suit in the Court of Chancery; and certain rules have been laid down upon the subject, which we have carefully considered. In *Hill* v. *Peel* (1), and in other cases which we had recently before us, we came to the conclusion that the party to whom costs were awarded was entitled to be indemnified against all costs reasonably incurred by him; and we likewise intimated our opinion,—and that opinion I am desirous of repeating,—that the parties are entitled to have the judgment of the master upon each particular item which they think fit to include in their bill of costs. No absolute or definite rule can be laid down as to what expenses are incurred reasonably: that must depend upon the particular circumstances of each case; and the master must exercise his discretion. In the present instance, he appears to have acted upon the notion that the delivery of the particulars under the rule of court was equivalent to the service of a notice of trial in an ordinary action; and accordingly he has disallowed nearly the whole of the expenses of the briefs, counsel's fees, and subpœnas. But in this I think the master has taken a

(1) Ante, p. 172.

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wrong view of the intention of the legislature and of the decisions of this Court. The election judges, in framing the rules under the Act, considered that three days before the hearing of the petition would, under all the circumstances attending these cases, be a right and reasonable time for the delivery of particulars. But it was not intended to intimate that the attorney or agent of the respondent was to do nothing before that period towards preparing to defend his seat. That would in all cases be inconvenient, and in many it would amount to a denial of justice. In practice, the respondent always has some general knowledge of the sort of case which it is proposed to make against him. And there are many matters which must of necessity be inquired into at an earlier stage than the delivery of particulars; such as, the conduct of the agents employed on his behalf at the election, and a variety of other matters. Upon these the master must in each case exercise his discretion as to whether or not the expenses are reasonably incurred by the attorney on behalf of his client, consistently with the rules we have laid down. I do not desire to fetter the discretion of the master; but, under all the circumstances of this case, and having regard to the rule that all expenses which have been reasonably incurred are to be allowed, I think the bill should be sent back to him to be re-considered. The parties are entitled to have the judgment of the master on any particular item; and the master must exercise his discretion as to whether it has been reasonably incurred or not in point of time as well as amount. With regard to the subpœnas, they are not to be issued the moment the petition is filed, but within such time as the master in his discretion may in each case deem reasonable. So, as to the delivery of the briefs: that which would be a reckless proceeding in one case may be a most prudent and necessary course to pursue in another. We affirm the rule which we laid down for the general guidance of the master in *Hill* v. *Peel* (1); and he will deal with this matter in accordance with that rule.

KEATING, J. I am of the same opinion. The master in this case seems to have acted upon a notion which cannot be sanctioned by the Court, viz. that the delivery of particulars upon an election

(1) Ante, p. 172.

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petition is equivalent to a notice of trial in an ordinary action. The Lord Chief Justice has referred to the cases in which the Court took great pains to lay down the principles which are to guide the master in the taxation of costs upon election petitions. I must confess I think the master has a very difficult duty to perform; but he must exercise the best judgment he can in each particular case.

MONTAGUE SMITH, J. I concur in thinking that this rule ought to be made absolute, on the ground that the master has proceeded upon a wrong principle in the taxation of these costs. He has considered that he ought not to allow the successful party all the costs incurred, though they may have been reasonably incurred, but that he ought to confine the allowance to the expenses incurred after the delivery of the particulars. Expenses, however, may in many cases be very reasonably and properly incurred before the delivery of the particulars; and, indeed, in most cases they must of necessity be so incurred. The respondent ordinarily has some general notion of the grounds of attack; and he would sustain great hardship at times if he were to delay getting up his defence until the last moment. The parties being in a state of warfare, the respondent is entitled to use all fair means to get information as to what his adversary is about; and I apprehend he is entitled to be indemnified against all the expenses which he has reasonably and properly incurred in so doing; in other words, such expenses as a prudent man exercising a reasonable discretion would have incurred if he knew he had to pay them out of his own pocket. With regard to the briefs, it may be that they ought to be delivered earlier than three days before the day appointed for the trial. I do not say they were properly delivered in this case; I do not wish to interfere with the discretion of the master in that respect. The proper time for the delivery of the briefs must depend upon the nature of the case, its magnitude and importance; and the master must in each case exercise his discretion. I do not, however, think it fair to counsel that briefs should be delivered too close to the day of trial; neither ought they to be delivered too early, or so as to cast an undue burthen on the other side. The master is the proper person to deal with that question. It appears

to me that he has not exercised his discretion upon it in this case; and therefore the matter must go back to him, in order that he may do so.

BRETT, J. I agree that this rule ought to be made absolute. The question is whether the respondent is entitled to costs reasonably incurred by him prior to the time fixed for the delivery of particulars of the specific charges intended to be made against him. It was the duty of the master to exercise his discretion as to whether the expenses claimed were or were not reasonably incurred. He has not done so in this case, because by reason of the petitioner having withdrawn his petition the costs so incurred turned out to have been incurred unnecessarily. But the petitioner might have prevented this by withdrawing his petition at an earlier period. The master has clearly acted under an erroneous notion.

Rule absolute with costs. (1)

Agents for petitioner: *Wyatt & Hoskins.*
Agents for respondent: *Law, Hussey, & Hulbert.*

(1) Upon the re-taxation the master allowed 700*l.* 17*s.* 3*d.*, which included 288*l.* 15*s.* as instructions for brief, 8*l.* 4*s.* for the agent's journey to Pembroke, 85*l.* for drawing and two copies of brief, 100 guineas to the senior counsel, and 75 guineas to the junior, and the clerks' fees, conferences, and attendances, and the expenses of the subpœnas.

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April 28.

Sheriff—Escape—Neglect to Plead Deed of Composition—Certificate of Registration—Bankruptcy Act, 1861 (24 & 25 *Vict. c.* 134), *ss.* 192, 198—*Bills of Exchange Act* (18 & 19 *Vict. c.* 67)—*Practice.*

Where a debtor, having had an opportunity to plead a deed under the Bankruptcy Act, 1861, s. 192, has neglected to do so, both he and the sheriff, provided the latter has notice of the facts, are estopped from relying on it, under s. 198, as a bar to an execution.

B. was on the 3rd of August served with a writ under the Bills of Exchange Act, at the suit of A., and on the 5th B. executed a composition-deed, which was registered on the 13th. On the 15th judgment was signed for non-appearance to the writ, and a ca. sa. issued on the 25th of September, under which B. was arrested. The sheriff, having notice of these facts, released B. from custody on being shewn the certificate of registration of the deed:—

Held, that the sheriff was liable to an action for an escape.

Semble, that the debtor might have obtained leave to appear to the writ at any time after the execution of the deed, and was not bound to wait until it was registered.

Action against the sheriff of Surrey, for that, the plaintiff having obtained judgment against one John Lamb, and a writ of ca. sa. having been issued against Lamb, which was delivered to the defendant to be executed, the defendant, having arrested Lamb, voluntarily suffered him to escape.

Pleas: 1. Not guilty. 2. That, after the defendant had arrested Lamb, and before the grievances in the declaration mentioned, Lamb shewed to the defendant a certificate under the hand and seal of the chief registrar in bankruptcy of the due filing and registration of a deed of composition between Lamb and his creditors, within the Bankruptcy Act, 1861, as a protection from arrest, and thereupon the defendant released Lamb from his custody.

The following case was stated for the opinion of the Court:—

1. On the 1st of August, 1868, the plaintiff commenced an action against Lamb upon a bill of exchange for 49*l.* 8*s.* 9*d.*

2. The writ was issued on the 1st of August, under the Bills of Exchange Act (18 & 19 Vict. c. 67), and was served on the 3rd of August. On the 5th of August, Lamb executed a composition-deed under the Bankruptcy Act, 1861, which was duly registered

on the 13th of August; and he obtained the usual certificate from the Court of Bankruptcy of his having so filed and registered the deed. The deed was a valid deed within the meaning of the Act.

3. On the 15th of August, judgment was signed against Lamb for want of appearance; and a writ of fi. fa. was issued against him, under which writ the officer of the sheriff entered into possession of Lamb's goods.

4. On the 17th of August a summons was taken out in the action of *Allen* v. *Lamb*, by the defendant Lamb, calling upon the plaintiff in that action (also the now plaintiff) and the sheriff of Surrey (the now defendant) to shew cause why the sheriff should not withdraw from possession, upon the ground that Lamb had obtained his protection from the Bankruptcy Court.

5. This summons was heard before Blackburn, J., and was dismissed with costs, upon the ground that the defendant had not pleaded the deed, and therefore could not avail himself of it as a protection.

6. On the 19th of August a second summons was taken out in the action of *Allen* v. *Lamb* by the defendant, calling upon the plaintiff to shew cause why the judgment in that action should not be set aside, and all further proceedings in that action stayed, upon the ground that Lamb had, on the 13th of August, 1868, duly registered a composition-deed and obtained his protection from the Bankruptcy Court.

7. This summons was heard before Willes, J., and was also dismissed, with costs, upon the same ground as the previous summons.

8. Before and at the time the writ of ca. sa., hereinafter mentioned, was delivered to the defendant, the fact of these summonses having issued, of their having been dismissed, and the grounds of their dismissal were known to the defendant; and the officer of the defendant being still in possession of the goods of Lamb, the same were sold, and they realized 17*l.* 8*s.* 6*d.* towards satisfaction of the judgment.

9. On the 25th of September, 1868, the plaintiff caused a writ of ca. sa. to be issued against Lamb for the balance due upon the judgment. This writ was delivered to the defendant

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as sheriff of Surrey, and the defendant duly took Lamb into his custody.

10. Whilst in the custody of the defendant, Lamb shewed to the defendant a certificate under the hand and seal of the chief registrar in bankruptcy, of the due filing and registration of the deed of composition so executed by Lamb on the 5th of August, 1868, and duly registered by him on the 13th, as mentioned in par. 2; and thereupon the defendant released Lamb from his custody, whereby the plaintiff alleges that he has lost the benefit of his writ.

It was agreed that the pleadings in this action and the proceedings in the action of *Allen* v. *Lamb* should form part of this case, and that the Court should be at liberty to draw any inferences or find any facts which in their opinion a jury ought to have drawn or found, and that the damages (if any) to which the plaintiff was entitled amounted to 38*l.* 8*s.* 6*d.*

The question for the opinion of the Court was, whether the defendant was justified in releasing Lamb.

Francis, for the plaintiff. Having neglected to plead the deed when he had an opportunity, the debtor was estopped from afterwards availing himself of it as a protection against the execution under s. 198 of the Bankruptcy Act, 1861. The question is concluded by *Rossi* v. *Bailey* (1) and *Godwin* v. *Stone*. (2) The law upon this subject had been left in some doubt by the cases of *Whitmore* v. *Wakerley* (3), *Hartley* v. *Mare* (4), and *Staffordshire Banking Co.* v. *Emmott*. (5) But all the authorities were carefully reviewed by the judgment of the Court of Queen's Bench in *Rossi* v. *Bailey* (1), which was followed by the Court of Exchequer in *Godwin* v. *Stone*. (2) The sheriff, having notice that the debtor might have pleaded the deed and had failed to do so, was bound to execute the process of the court, notwithstanding the production by the debtor of the certificate of registration; and par. 8 of the case shews that the sheriff here had notice of all the facts. The next question is, whether the debtor had, in fact, an

(1) Law Rep. 3 Q. B. 621.
(2) Law Rep. 4 Ex. 331.
(3) 3 H. & C. 538; 34 L. J. (Ex.) 83.
(4) 19 C. B. (N. S.) 85; 34 L. J. (C.P.) 187.
(5) Law Rep. 2 Ex. 208.

opportunity of pleading the deed. Now, the writ was served on the 3rd of August. The debtor had twelve days to appear, which time would expire on the 14th, and judgment was signed on the 15th. The deed was executed on the 5th of August, and was registered on the 13th. Consequently, the debtor might have obtained leave to appear at any time after the 5th. In *Braun* v. *Weller* (1), which will probably be relied on for the defendant, the deed was registered on the 7th of May, and judgment was signed on the 8th; the debtor, therefore, had not a reasonable opportunity of pleading the deed. Besides, there the question was between the parties.

Denman, Q.C. (*Abbott*, with him), contrà. *Braun* v. *Weller* (1) is a distinct authority that the debtor here had no reasonable opportunity of pleading the deed. The registration taking place on the 13th, he could have only one day, and that can hardly be said to be a reasonable time.

[BOVILL, C.J. The master reports to us that it is every day's practice to allow a defendant to appear, where it is shewn that a deed has been executed, and the judge or master is satisfied that it will be duly registered.

The debtor would have no complete defence, legal or equitable, until the registration of the deed; he, therefore, could not properly have applied for leave to plead until the 14th.

The whole of the facts which are now before the Court were not before the learned judges at chambers; and they certainly never could have intended to over-rule a decision of the Exchequer Chamber. *Rossi* v. *Bailey* (2) and *Godwin* v. *Stone* (3) are in direct conflict with *Lloyd* v. *Harrison* (4); and, assuming them to be law, they are not applicable to the present case. They were not actions for escape. All the reasoning in the judgments in *Lloyd* v. *Harrison* (4) goes to shew that the sheriff is justified in discharging the debtor if a proper certificate is produced to him.

[BRETT, J. If that is all the knowledge the sheriff has, *Lloyd* v. *Harrison* (4) justifies him. But here the sheriff had notice of

(1) Law Rep. 2 Ex. 183.
(2) Law Rep. 3 Q. B. 621.
(3) Law Rep. 4 Ex. 331.
(4) 6 B. & S. 36; 34 L. J. (Q.B.) 97: in error, Law Rep. 1 Q. B. 502.

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something more. The certificate gave him notice of the date of the deed and of the registration, and the ca. sa. informed him when the judgment was signed; so that he had the means of knowing that the debtor might have pleaded the deed, and had not done so. *Williams* v. *Rose* (1), and *Dignam* v. *Baily* (2), both of which were decided before *Rossi* v. *Bailey* (3), were actions for escapes.]

Francis was not called upon to reply.

BOVILL, C.J. After the recent decisions in the Courts of Queen's Bench and Exchequer, the law which must govern this case is perfectly clear. There had been two decisions, one of *Williams* v. *Rose* (1), in the Exchequer, the other of *Dignam* v. *Baily* (2), in the Queen's Bench, in which the sheriff was held liable for an escape for discharging the debtor on production of a certificate of the registration of a deed under the Bankruptcy Act, 1861. In each of those cases, the deed was duly registered and a certificate granted and exhibited to the sheriff; but it appeared that not only was the judgment obtained subsequently to the registration of the deed, but the cause of action was also subsequent. The sheriff, however, could have no knowledge of this latter fact; he could only know that the judgment was subsequent; and, when the question came again before the Court of Queen's Bench in *Rossi* v. *Bailey* (3), where the execution was upon a judgment obtained after the registration of the deed, for a cause of action which existed before, but the debtor had neglected to plead the deed, the Court took time to consider. All the authorities were carefully reviewed; and the judgment of the Court was delivered by Blackburn, J. In the course of it he says (4): "It has been decided in *Williams* v. *Rose* (1), by the Exchequer, and in *Dignam* v. *Baily* (2), by this Court, that a sheriff was liable to an action for an escape, who discharged the execution-debtor taken under a ca. sa., on the production of a certificate of the registration of a deed previous to the date of the judgment. In both these cases the *debt* in fact accrued after the registration; but, as the sheriff had no means of ascertaining the date of the cause of action

(1) Law Rep. 3 Ex. 5.
(2) Law Rep. 3 Q. B. 178.
(3) Law Rep. 3 Q. B. 621.
(4) Law Rep. 3 Q. B. at p. 626.

(though the ca. sa. gives him the date of the judgment), it would appear that, on the principle laid down in *Lloyd* v. *Harrison* (1), the sheriff would have been excused in obeying the certificate, if the protection applied to any judgment obtained after the registration of the deed. It could never, we think, be the intention of the legislature that, if the officer detained the debtor on such an execution, and it turned out that the debt in respect of which the judgment was given was, in fact, contracted before the execution of the deed, he should be liable to a penalty of 5*l.* a day; and that, if he obeyed the protection, he should be liable to an action for an escape if it turned out that the debt had been contracted after the execution of the deed, there being no means whatever by which that fact could be ascertained by him. It seems to us, therefore, that these two decisions can only be supported by holding that the debtor, not having availed himself of the deed by pleading it so as to prevent the judgment, is, as against the officer at least, precluded from availing himself of the certificate as a protection in bankruptcy; and this goes a great way towards establishing that he cannot make use of it as against the creditor." And further on he says (2): "We agree with Channell, B., that the general rule of law is, that the party who might have pleaded and prevented a judgment, and did not, is estopped from afterwards raising that defence, and that, as the legislature might have enacted that this doctrine of estoppel should not apply, the real question is whether they have so enacted. And we think they have not. We can find no words expressing an intention so to enact; and, as the effect of such an enactment would be to place a debtor executing a deed in a very much better position than a bankrupt who has obtained his order of discharge, we think the legislature cannot be taken to have intended so to enact. We think also, as already intimated, that the cases of *Williams* v. *Rose* (3) and *Dignam* v. *Baily* (4) will be quite consistent with the principle laid down in *Lloyd* v. *Harrison* (5), if we hold that the sheriff, seeing by the certificate the date of the registration, and by the ca. sa. the date of the judgment, is affected with

(1) 6 B. & S. 36; 34 L. J. (Q.B.) 97: in error, Law Rep. 1 Q. B. 502.
(2) Law Rep. 3 Q. B. at p. 628.
(3) Law Rep. 3 Ex. 5.
(4) Law Rep. 3 Q. B. 178.
(5) Law Rep. 1 Q. B. 502.

(1) 12 Jur. N.S. 502
1 Jur. N.S. 364

(5) 12 Jur. N.S. 502.

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notice that the debtor, if he was entitled to plead the deed, did not do so, and that this is enough to prevent him from availing himself of it. But, if we decided that the protection is to be available whenever the debt is in fact one to which the deed applies, that being a fact which the sheriff has no means of knowing, we think we should, if we did not over-rule those two cases, at least render them very questionable; as they would then seem to be in conflict with the principle laid down by the Exchequer Chamber in the case of *Lloyd* v. *Harrison*." (1) That seems to lay down a very clear and intelligible principle, and entirely governs the present case. It was further acted upon in *Godwin* v. *Stone*. (2) Mr. Denman admitted that the last-mentioned case was an authority against him; but he suggested that it underwent no argument. It is true, the question was not very fully discussed there; but it had been so recently discussed in *Rossi* v. *Bailey* (3), that it was deemed unnecessary to discuss it further. It seems to me, therefore, that there is direct and clear authority, that, where the debtor has had an opportunity of pleading the deed, and has neglected to avail himself of it, he is not entitled to the benefit of it, either as against the sheriff or as against a creditor. Mr. Denman's main reliance was upon *Lloyd* v. *Harrison*. (1) That case, however, is clearly distinguishable. The judgment was prior to the certificate of registration; and no such question arose there as is presented here. The subject was exhausted in *Rossi* v. *Bailey* (3), the decision in which is entirely consistent with *Lloyd* v. *Harrison*. (1)

This brings us to the question of fact, whether or not the defendant here had an opportunity of pleading the deed. In *Braun* v. *Weller* (4), the deed was registered on the 7th of May, and judgment was signed on the 8th, so that it was physically possible for the debtor to have pleaded the deed on the afternoon of the 7th or early on the 8th; but it was held that the debtor was not bound to avail himself of such an opportunity. Here, however, the facts are different; the deed was executed on the 5th of August, and was registered on the 13th; the writ under the Bills of Exchange Act was served on the 3rd, and consequently

(1) Law Rep. 1 Q. B. 502.
(2) Law Rep. 4 Ex. 331.
(3) Law Rep. 3 Q. B. 621.
(4) Law Rep. 2 Ex. 183.

W S C 12 Jur N S. 701

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the time for obtaining leave to appear and plead would expire on the 14th. The debtor, therefore, independently of the question whether or not he could have obtained such leave before the registration of the deed, had at all events all the 14th to apply for leave: and the master tells us that it is every day's practice to allow a defendant to appear, on its being shewn to the satisfaction of the judge or master that a deed has been executed and will be registered within the proper time. The debtor might, therefore, have applied at any time between the 5th and the 15th. That being so, I conclude as matter of fact that there was ample opportunity to plead the deed; and, as the debtor failed to avail himself of that opportunity, the deed is no defence. It has been said that there is a difference in this respect between the case of an execution against the person and an execution against the goods. But I see no ground for any such distinction. It was also suggested that there is a difference where the question arises between the parties, and where it arises between the creditor and the sheriff. I think there is no such distinction when the sheriff knows all the material facts. This is no hardship to the sheriff in this case. He had ample notice that the deed was not available against the execution, and that two judges had refused to give the debtor relief.

BYLES, J. I am of the same opinion. The leading authority on the subject is *Rossi* v. *Bailey* (1), which is founded on good sense and sound law. The decision is to the effect, that, if the debtor neglects to avail himself of the opportunity of pleading the deed, he cannot rely on it as a bar to the execution, and the sheriff has a right to presume that he has no answer to the execution. The question then is, whether the debtor here had an opportunity of pleading the deed. It seems to me that he had two opportunities. There was a perfectly valid deed executed on the 5th of August, regular in matter of form; and the debtor, according to the practice of the court, might have obtained leave to appear at any time between that and the 13th, the day when the deed was registered. Besides that, he had at all events the whole of the 14th. Applying the case of *Rossi* v. *Bailey* (1) to the facts of this

(1) Law Rep. 3 Q. B. 621.

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case, it is plain that, the debtor having neglected to avail himself of this defence, the sheriff having knowledge of this fact was not right in discharging him. As to the second question, I must own I have entertained some doubt. But the cases of *Williams* v. *Rose* (1) and *Dignam* v. *Baily* (2) seem to shew that under the circumstances the sheriff is liable for having released the debtor. My Lord having gone so fully into the authorities, it is enough for me to add that I entirely concur in the judgment he has pronounced.

BRETT, J. This is an action against the sheriff for an escape, and his answer in point of law is that, the debtor while in his custody produced a certificate of registration of a deed under the Bankruptcy Act, 1861; and the sheriff alleges that that was sufficient authority to discharge the debtor. He further alleges that, if that be not so, and he would not be authorized to discharge the debtor, if he knew that the debtor had had an opportunity to plead the deed and had neglected to do so, yet here, upon the facts, there was no reasonable opportunity for the debtor to plead the deed. I at one time thought there was something in this: but, on hearing what the practice at chambers is, and considering the large words in the statute, I do not see my way to the conclusion that the practice is wrong; and therefore I think the debtor had a reasonable opportunity to plead, as he could have gone to a judge after the 5th and got leave to appear, and could then have got further time until the registration of the deed. The question, therefore, is, whether the second proposition relied on by Mr. Denman is correct, viz. whether, when the sheriff has the debtor in his custody under a ca. sa., the production of the certificate of registration authorizes him at once to release the debtor. In the case of *Lloyd* v. *Harrison* (3) it was held that, where the only information the sheriff has is from the certificate of registration, he is not bound to inquire further, and may release the debtor. But it must be borne in mind that there are two modes in which the deed fails to be available to the debtor. In the first place, it may be a bad deed. The certificate of registration would not shew that: and *Lloyd* v. *Harrison* (3) seems to be an authority for saying that the production of

(1) Law Rep. 3 Ex. 5. (2) Law Rep. 3 Q. B. 178.
(3) Law Rep. 1 Q. B. 502.

the certificate protects the sheriff, notwithstanding the deed is a bad one. The other case is where the deed is good, but not available, because the debtor has failed to plead it. *Williams* v. *Rose* (1) and *Dignam* v. *Baily* (2) shew that, where that is the case, and the certificate is produced to the sheriff, who has the writ of ca. sa. in his possession, his attention is called to the dates of the execution and registration of the deed and of the judgment, which necessarily shew him that the debtor had the opportunity to plead the deed and has failed to do so; and that, on those facts coming to his knowledge, the sheriff is bound to know that the deed affords no protection to the debtor; and, if he discharges the debtor with that knowledge, he is liable for an escape. *Williams* v. *Rose* (1) is strongly in point as to that; for, the replication alleged knowledge; and, although *Dignam* v. *Baily* (2) is not so strong an authority, as there knowledge was not averred, it is explained in *Rossi* v. *Bailey* (3), where Blackburn, J., says, that there was no necessity to allege knowledge, because the certificate and the ca. sa. necessarily brought the facts home to the sheriff. *Godwin* v. *Stone* (4) also is a strong authority that, where the facts are known to the sheriff, the mere production of the certificate does not warrant him in releasing the debtor. I therefore agree with the rest of the Court that the plaintiff is entitled to judgment.

Judgment for the plaintiff.

Attorney for plaintiff: *E. Newman.*
Attorneys for defendant: *Abbott, Jenkins, & Abbott.*

(1) Law Rep. 3 Ex. 5.
(2) Law Rep. 3 Q. B. 178.
(3) Law Rep. 3 Q. B. 621.
(4) Law Rep. 4 Ex. 331.

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April 27.

IN RE HANNAH PACKER.

Married Woman—Fines and Recoveries Act (3 & 4 Wm. 4, c. 74), s. 85—Regulæ Generales (Court of Common Pleas), Hilary Term, 1834—Filing Certificate of Acknowledgment and Affidavit—Practice.

The Court will, in exceptional cases, dispense with the observance of the rules of Hilary Term, 1834, made under s. 89 of the Fines and Recoveries Act.

The Court ordered a certificate of acknowledgment of a deed by a married woman, and affidavits verifying it, to be filed, although the affidavits did not strictly comply with the rules of Hilary Term, 1834, it being shewn that under the circumstances it was impossible to obtain affidavits in accordance with those rules, and that the affidavits did comply with all the provisions of the Fines and Recoveries Act.

APPLICATION to the Court to direct that the certificate of acknowledgment of a deed by a married woman, and affidavits verifying the same, might be received and filed by the proper officer of the Court, pursuant to the Fines and Recoveries Act (3 & 4 Wm. 4, c. 74), under the following circumstances.

The deed was a mortgage deed of lands for 700*l.*, executed by Hannah Packer, a married woman, and dated the 19th of October, 1857; the deed contained a power of appointment of the property by Hannah Packer, subject to the mortgage, which she subsequently exercised in favour of her husband, Elijah Packer. The deed was acknowledged before two perpetual commissioners, D. Smart and C. Lowcroft, who signed the memorandum upon the deed required by the Act, and also the usual certificate that the deed had been duly acknowledged, which was left with Mr. Lowcroft, who was the solicitor acting for the parties, that he might get it verified and registered. Hannah Packer and the two commissioners subsequently died, and in 1870 Elijah Packer being desirous of paying off the mortgage, it was, for the first time, discovered that the certificate of acknowledgment had never been filed, as required by the Act. Search having been made for the certificate, it was found among Mr. Lowcroft's papers, but no trace could be found of any affidavit in verification of it. All the parties present at the separate examination of Hannah Packer being dead, the only affidavits that could be obtained were one by a practising attorney, who succeeded Mr. Lowcroft in his business, and one by Elijah

Packer; the former, first, verified the signatures of the commissioners to the memorandum on the deed and the certificate; secondly, verified the signatures of the parties to the deed; and, thirdly, stated that he knew Hannah Packer, and that she was at the time of the execution of the deed of full age and competent understanding.

The affidavit of Packer verified all the above facts, and also stated that he had gone with his wife to the commissioners, and was present when the deed was acknowledged by her, and only left the room at the request of the commissioners, while they examined his wife apart from him, and that, on being readmitted, he was informed by the commissioners that his wife had been examined whilst apart from him touching her knowledge of the contents of the deed, and that she had fully consented to the same.

The affidavit contained also the other particulars required by rules of Hilary Term, 1834.

F. M. White, in support of the motion, contended that the Fines and Recoveries Act (3 & 4 Wm. 4, c. 74), s. 85, did not require the certificate to be registered immediately, or the affidavit of verification to be made by a practising attorney, that all its provisions were complied with, and that the rules of Court, which were made under s. 89 (1) of the Act, were rules of practice only, and

(1) By the Regulæ Generales of the Court of Common Pleas, Hilary Term, 1834, it is provided, amongst other things, as follows:—"The affidavit verifying the certificate to be made pursuant to the said Act, and which certificate shall be in the form contained in the said Act shall . . . be made by some practising attorney or solicitor, . . . and that in all cases it shall be deposed, in addition to the verification of the said certificate, that the deponent . . . knew the person or persons making such acknowledgment, and that at the time of making such acknowledgment the person or persons making the same was or were of full age and competent understanding; and that one at least of the commissioners taking such acknowledgment, to the best of his (deponent's) knowledge and belief, is not in any manner interested in the transaction, giving occasion for the taking of such acknowledgment, or concerned therein as attorney, solicitor, or agent, or as clerk to any attorney, solicitor, or agent so interested or concerned; and the names and residences of the said commissioners, and also the place or places where such acknowledgment or acknowledgments shall be taken, shall be set forth in such affidavit; and that previously to such acknowledgment being taken, the deponent had inquired of such married woman . . . whether she intended to give up her interest in the estate to be passed, and also the answer given

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that the Court could dispense with the observance of them; that it was impossible now to get an affidavit of the particulars required by the rules except from Packer, in consequence of the death of all the persons who were acquainted with the transactions, and that the delay in filing the certificate was sufficiently explained. He referred to *Ex parte Stevens* (1), in which the Court had allowed a certificate of acknowledgment to be filed after the time allowed by the rules had expired.

BOVILL, C.J. It seems to me that the affidavits amount to a sufficient compliance with the Act of Parliament, and therefore the Court has the power to order that the certificate and affidavits be filed. The death of the parties present at the separate examination of the married woman makes it impossible to comply strictly with the rules of Court. The rules, however, are not given by the statute the force of law, but are rules of practice, and in the case cited they had not been literally followed, and yet the Court ordered the certificate to be filed. If there had been a failure to comply with the provisions of the Act, the case would have been different. The Court, therefore, has the power to grant the applica-

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thereto; and where any such married woman, in answer to such inquiry, shall declare that she intends to give up her interest without any provision, the deponent shall state that he has no reason to doubt the truth of such declaration, and he verily believes the same to be true. And where any provision has been agreed to be made, the deponent shall state that the same has been made by deed or writing, or if not actually made before, that the terms of the intended provision have been reduced into writing, which deed or writing he verily believes has been produced to the said (judge, master) or commissioners. . . . The certificate and affidavits verifying the same shall within one month from the making the acknowledgment be delivered to the proper officer appointed under the said Act, and the officer shall not after that time receive the same without the direction of the Court or a judge."

By the Regulæ Generales of the Court of Common Pleas, Trinity Term, 1834, it is provided, "that where such parts of the affidavit verifying the certificate of acknowledgment, taken in pursuance of the late Act of Parliament respecting fines and recoveries, as state the deponent's knowledge of the party making the acknowledgment, and her being of full age, cannot be deposed to by a commissioner, or by an attorney or solicitor, the same may be deposed to by some other person whom the person before whom the affidavit shall be made shall consider competent so to do."

(1) 3 Hodges, 13.

tion; and I have no doubt that, under the circumstances of this case, it is proper to do so.

Byles, J. I am of the same opinion, though not without hesitation. The Act of Parliament has been complied with. No affidavit strictly complying with the requirements of the rules of Court can be obtained, but the best affidavit that is possible under the circumstances is produced, which verifies what was said at the time by the commissioners, and which would not have been said by them if the acknowledgment had not been duly made.

The second objection is, that the time for filing the certificate according to the rules, is past; but the Court has already granted a similar application, where the rules have not been complied with in that respect. I hope, therefore, we are not going too far in ordering the certificate and affidavits in this case to be filed.

Brett, J. I also have felt some difficulty in this case, because it seems clear that the rules have not been complied with, and I think, unless in most exceptional cases, we should insist upon compliance with them. The statute, however, does not say that the rules should form part of itself; and they are, in fact, rules of practice, while the provisions of the Act, which are binding on the Court, have in this case been complied with. In the present case, as all the parties who were present when the married woman was examined are dead, and the best affidavit that can now be made is produced, I think the application should be granted.

Motion granted.

Attorneys for applicant: *Dyne & Harvey.*

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April 30.

EVERARD *v.* KENDALL.

County Court — Admiralty Jurisdiction — Collision between Two Barges — 31 & 32 Vict. c. 71, s. 3; 32 & 33 Vict. c. 51, s. 4 — Practice — Prohibition.

A judge of a county court having admiralty jurisdiction under 31 & 32 Vict c. 71, and 32 & 33 Vict. c. 51, assumed to exercise such jurisdiction in a case of collision on the Thames between two barges propelled by oars only.

Held, on motion for a writ of prohibition to the judge, that the admiralty jurisdiction of the county court in cases of collision was not more extensive than that of the High Court of Admiralty, and as the Court of Admiralty had no jurisdiction over such a collision, that the county court had no such admiralty jurisdiction, and that the prohibition should issue.

Two lighters or barges, propelled by oars only, belonging to the plaintiff and defendant respectively, were moored at a wharf in the Thames, and came into collision with one another, and the plaintiff's barge was seriously damaged. The plaintiff sued out a plaint against the defendant in the City of London Court, under its admiralty jurisdiction, and an order was made for the seizure of the defendant's barge. Application was thereupon made to Montague Smith, J., at chambers, for a prohibition. The learned judge referred the matter to the Court.

Lanyon moved for a writ of prohibition to the judge of the City of London Court, to prohibit him from proceeding in or hearing the plaint. The question is whether the cause of action is one which a county court can entertain under its admiralty jurisdiction. That jurisdiction was first conferred upon the county courts by the 31 & 32 Vict. c. 71, passed in 1868. The 3rd section enacts that "any county court having admiralty jurisdiction shall have jurisdiction, and all powers and authorities relating thereto, to try and determine, subject and according to the provisions of this Act, the following causes (in this Act referred to as admiralty causes); . . . (3) As to any claim for damage to cargo, or damage by collision,—any cause in which the amount claimed does not exceed 300*l*." Then came the 32 & 33 Vict. c. 51, which was passed in 1869, s. 4 of which enacts that "the 3rd section of the County Courts Admiralty Jurisdiction Act, 1868, shall extend and apply to all claims for damage to ships, whether by collision or otherwise,

when the amount claimed does not exceed 300*l.*" Is this a claim for damage to a "ship?" The Act of 1869 only mentions ships, and there is no interpretation clause. The Act of 1868 uses the term "vessel" only throughout; and by the interpretation clause at the commencement of the General Orders made pursuant to that Act (1), "vessel" is to "include every description of vessel used in navigation not propelled by oars only." The manifest intention of these Acts was to give to the county courts, up to the limit of 300*l.*, the same jurisdiction which the High Court of Admiralty possessed, and no more. The definition of "ship" in the Admiralty Court Jurisdiction Act, 1861, 24 Vict. c. 10, s. 2, is the same as that of "vessel" in the General Orders made under the Act of 1868.

The 6th section of the Admiralty Court Act of 1840, 3 & 4 Vict. c. 65, enacted that the High Court of Admiralty should have jurisdiction to decide all claims for "damage received by any ship or sea-going vessel," whether such ship or vessel may have been within the body of a county or upon the high seas at the time when the damage was received in respect of which such claim is made. In the case of *The Bilbao* (2), it was held by Dr. Lushington that the above enactment did not give the Court of Admiralty jurisdiction in the case of damage to a vessel not "a sea-going vessel" (a barge) by a collision.

Day shewed cause in the first instance. The effect of the statutes of 1868 and 1869 is to give the county court jurisdiction to try any of the causes mentioned in s. 3 of the former and s. 4 of the latter Act, without reference to the jurisdiction of the High Court of Admiralty, where the claim does not exceed 300*l.*

[KEATING, J., referred to s. 7 of 31 & 32 Vict. c. 71.]

That section might have the effect, incidentally, of giving jurisdiction to the High Court of Admiralty in a case in which it possessed none before. Many of the cases which are now determinable in the county court, in virtue of the jurisdiction created by the statutes now in question, were not before determinable in the Court of Admiralty, and are so now only by implication. The

(1) See Williams & Bruce's Adm. Pr. sup. 24.

(2) Lush. Adm. R. 149.

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jurisdiction of the county court is to be tested only by the words of the enactments. The language of s. 4 of the 32 & 33 Vict. c. 51, is larger than that of the 31 & 32 Vict. c. 71, s. 3: in the latter, the words are "damage by collision;" in the former, "all claims for damage to ships, whether by collision *or otherwise*." The expression "admiralty causes" in s. 3 of the Act of 1868 does not mean admiralty causes properly so called, but causes which are in that Act referred to as admiralty causes.

[BRETT, J. Does not s. 22 shew that damage by collision between two sea-going ships or vessels is meant?]

Vessel is a large expression, and would in common parlance include a barge: and the word "property" is also used in that section.

Section 35 of the 31 & 32 Vict. c. 71, under which the General Orders were made, conferred upon the framers of those orders no power to extend or to restrict the jurisdiction given by the Act. There is nothing to authorize them to define what a "ship" is.

[BRETT, J. Do you find any case where the Court of Admiralty has dealt with a collision between two barges?]

There is no such case to be found. The nearest case is that of *The Sarah* (1), but there the damage was done upon the high seas.

Lanyon, in reply.

KEATING, J. This is an application for a writ of prohibition to restrain the judge of the City of London Court from entertaining a suit for damage arising from a collision between two lighters or barges in the river Thames. These barges are, it is conceded, propelled by oars only; and the question is whether the county court has jurisdiction to determine a case of collision between two such vessels. I am of opinion that the Acts of Parliament do not invest the court with any such power. The extent of the jurisdiction must depend upon the language used by the legislature in the Acts creating it. The principal statutory provisions upon which the question turns are s. 3 of 31 & 32 Vict. c. 71, and s. 4 of 32 & 33 Vict. c. 51. Reading them, notwithstanding the ingenious argument of Mr. Day, I cannot satisfy myself that it was the intention of the legislature to give the county courts a jurisdiction over admiralty causes other than those over which the Admiralty

(1) Lush. Adm. R. 549.

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Court has jurisdiction. It is admitted that the Court of Admiralty has never exercised jurisdiction in cases of collision between vessels of the description of those now in question; and I am unable to discover any intention to confer upon the county courts a larger jurisdiction in this respect. Mr. Day has suggested that the expression "admiralty causes" in the 31 & 32 Vict. c. 71, s. 3, does not mean admiralty causes properly so called, that is, causes over which the Court of Admiralty had jurisdiction, but causes which are referred to in the Act as admiralty causes. I am not prepared to say that that suggestion is destitute of foundation. But, looking at the whole scope of the Act, I cannot agree in the conclusion to which Mr. Day's argument invites us. The 7th section seems to me to be quite inconsistent with the construction contended for, because, if Mr. Day's contention were adopted, causes over which the Court of Admiralty clearly has no jurisdiction might be sent up to it from the county court under that section. That is a strong argument to my mind, to shew what the intention of the legislature was. Mr. Day says that there would be no inconsistency in holding that the High Court of Admiralty might by force of that section acquire a jurisdiction which it did not before possess. That, however, would be a very strained construction, and would impute to the legislature great clumsiness in the mode of extending the jurisdiction of the Court of Admiralty. It is manifest from several other sections of the Act that the legislature had no intention to change the description of vessels to be subjected to the jurisdiction of the Admiralty Court. And I think the admiralty jurisdiction given to the county courts under the Act of 1868 is not, either in terms or by inference, extended in cases of collision, by s. 4 of the 32 & 33 Vict. c. 51. The words of that section are,—"The 3rd section of the County Courts Admiralty Jurisdiction Act, 1868, shall extend and apply to all claims for damage to ships, whether by collision or otherwise, where the amount claimed does not exceed 300*l.*" It is remarkable that whenever a definition is given in any Act of Parliament of "ship" or "vessel," barges have invariably been excluded. It seems to me, therefore, that, as the Court of Admiralty before the passing of these Acts had no jurisdiction in the case of a collision between two barges, and as the legislature has only transferred to the county courts

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a portion of the jurisdiction of the Court of Admiralty in cases of collision, if it had been intended to enlarge that jurisdiction by extending it to barges, we should have found some clear and unquestionable expression of that intention. I find none such, and therefore I come to the conclusion that the judge of the City of London Court had no jurisdiction to proceed in this case, and that the prohibition must go. It may be a casus omissus: but, even if it were, it is not for us to supply the omission. It is unnecessary to consider whether or not the General Orders of 1869 were made under sufficient authority, though I desire not to be understood as entertaining a doubt upon the subject. My opinion is based upon the general provisions of the Acts.

MONTAGUE SMITH, J. I also am of opinion that the prohibition should go. The jurisdiction of the county court depends upon the construction of the two statutes of 1868 and 1869. The scheme of the Act of 1868 is that the Queen in Council may, if she deems it expedient, by order in council, appoint any county court to have admiralty jurisdiction, and assign to it a district for admiralty purposes. That is confined to admiralty jurisdiction only. Then, s. 3 enacts "that any county court having admiralty jurisdiction shall have jurisdiction, and all powers and authorities relating thereto, to try and determine, subject and according to the provisions of this Act, the following causes (in this Act referred to as admiralty causes):" sub-sect. 3 is, "As to any claim for damage to cargo, or damage by collision,—any cause in which the amount claimed does not exceed 300*l*." What is the meaning of "damage by collision?" We have nothing to guide us as to what damage by collision is within the Act, except the general scope and object of the Act. In common understanding, and as understood in the Court of Admiralty, damage by collision is damage sustained by a ship from another ship coming in contact with it. What then, is the meaning of "ship?" It is conceded that, in the Court of Admiralty, the jurisdiction exercised in respect of collisions is confined to cases of vessels not propelled by oars alone. I can see no intention on the part of the legislature to alter the jurisdiction of the Court of Admiralty as to the definition of "ship." In the 24 Vict. c. 10, the preamble of which declares it to be passed

for the purpose of extending the jurisdiction of the Court of Admiralty, "ship" is defined in s. 2, to mean "any description of vessel used in navigation not propelled by oars." Therefore, at the time the Act of 1868 was passed for the purpose of conferring upon the county courts an admiralty jurisdiction, the Court of Admiralty, according to its original and statutory jurisdiction, had no power, in cases of collision, to deal with any other than sailing or sea-going vessels. The Act of 1869 in no way enlarged the jurisdiction of the county court in this respect. The object of s. 4 of that Act may have been, and I think was, to extend the jurisdiction to claims for damage done otherwise than by collision. Ship, in this Act, must be taken to be limited to ships as defined in the Admiralty Acts, and as well known and understood in the Admiralty Court. For these reasons, I think the case of a collision with a barge is not within either statute. I agree that it is unnecessary, for the purpose of the decision of this matter, to give any binding force to the General Orders of 1869. But, though it is not necessary to pronounce any decision upon the point, I think those general orders are a strong indication that, in the opinion of the very learned persons by whom they were framed, our interpretation of the Acts is the right one; for, we have the opinion of two very high judicial authorities that "ship" does not include a vessel propelled only by oars.

BRETT, J. I am of the same opinion. Here, the collision was between two barges in the Thames; and the defendant's barge has been seized under the admiralty jurisdiction of the City of London Court; and the question is whether the judge of that court had such a jurisdiction. It is insisted that he had by s. 3 of the Act of 1868 and s. 4 of the Act of 1869. The former gives the county court power to try and determine, amongst others, any claim for damage to cargo or damage by collision where the amount claimed does not exceed 300*l.*; and s. 4 of the Act of 1869 enacts that the jurisdiction given by the former section shall extend and apply to all claims for damage to ships, whether by collision or otherwise, to the like limited amount; in other words, those Acts give the county court an admiralty jurisdiction. The question is whether either of those Acts give such jurisdiction in a case of

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damage done by a collision by one barge to another barge. It is contended that as the jurisdiction is extended to all claims for damage by collision to all ships, damage done by collision to a barge is within the provision. If so, the question turns upon the meaning of "ship." To discover that, we must have recourse to Acts of Parliament which are in pari materiâ. I do not find in any of them that "ship" has ever included such vessels as are here spoken of. As to collision, at least, s. 4 of the Act of 1869 does not enlarge the jurisdiction given to the county court beyond that given by the Act of 1868, as to the kind of vessel. It does enlarge the jurisdiction by giving it a jurisdiction in rem. That drives us back to the Act of 1868, which gives the county court power to try in a particular way questions of salvage, claims for towage, necessaries supplied to ships, and wages, and claims for damage to cargo or damage by collision. Damage by what collisions? Looking at ss. 7 and 22 of the Act of 1868, it seems to me that it means a collision between two vessels,—such vessels as were formerly dealt with in the Admiralty Court. What were those vessels? The Court of Admiralty never claimed jurisdiction in cases of collision between two vessels propelled by oars only. The 3 & 4 Vict. c. 65, s. 6, gave the Court of Admiralty jurisdiction whether the ship was or was not upon the high seas at the time of the damage, &c. That was held by Dr. Lushington, in the case of *The Bilbao* (1), not to mean a vessel propelled by oars. I am of opinion that the collisions spoken of in the Act of 1868, mean collisions between vessels propelled otherwise than by oars; and, if the Act of 1868 only applies to collisions between vessels propelled otherwise than by oars, I think the Act of 1869 applies to similar vessels. There is nothing to shew that "ship" in the one Act means anything more than "vessel" in the other. For these reasons, I think this was not a case of collision over which the City of London Court had admiralty jurisdiction, and therefore that the writ must issue.

Rule absolute, without costs.

Attorney for plaintiff: *J. A. Farnfield.*

Attorney for defendant: *B. F. French.*

(1) Lush. Adm. R. 149.

DAVIS *v.* PEARCE.

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April 30.

County Court—Summons under 30 & 31 *Vict. c.* 142, *s.* 2—*Personal Service—Practice—Order to proceed.*

30 & 31 Vict. c. 142, s. 2, enacts that in any action in a county court for the price of goods sold to a defendant, to be dealt with in the way of his trade, the plaintiff may issue a summons in a specified form, and such summons shall be personally served on the defendant, and if the defendant does not give notice of his intention to defend, the plaintiff may, without proof of his claim, upon proof of service of the summons, have judgment against the defendant.

The plaintiff issued a summons under this section. The summons was personally served upon the defendant, who duly gave notice of his intention to defend, and appeared at the return day to defend the action. The judge ruled that the plaintiff must prove personal service of the summons; the plaintiff was unable to prove the service. The judge then declined to hear the case, and directed a nonsuit:—

The Court held that the plaintiff was not bound to prove the personal service, and made an order under 19 & 20 Vict. c. 108, s. 43, directing the judge to proceed to hear and determine the cause.

On the 22nd of March, 1870, a plaint was issued out of the Shoreditch county court, under s. 2 of the 30 & 31 Vict. c. 142 (1), for hearing on the 12th of April, to recover 11*l.* 12*s.* 10*d.* for goods sold and delivered by the plaintiff to the defendant, to be dealt with by the defendant in the way of his trade. The defendant gave due notice of defence to the action. On the day appointed for the hearing, both parties were in attendance with their attorneys and witnesses. The judge called upon the plaintiff's

(1) 30 & 31 Vict. c. 142, s. 2, enacts that, "in any action brought in a county court for the price or value of goods or chattels which or some part of which were sold and delivered to the defendant to be dealt with in the way of his trade, profession, or calling, the plaintiff may, at his option, cause to be issued a summons . . . in the form contained in Sched. B. to the Act; and, if such last-mentioned summons be issued, it shall be personally served on the defendant . . . twelve clear days at least before the return day thereof, and then, if the defendant shall not, at least six days before such return day, give notice . . . of his intention to defend, the plaintiff may . . . without giving any proof of his claim, have, upon proof by affidavit of the service of the summons, judgment entered up against the defendant for the amount of his claim and costs. . . . Provided that, where the defendant shall give such notice as above specified, the action shall be heard in the ordinary course. . . ."

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attorney to prove the service of the plaint on the defendant. The plaintiff's attorney submitted that such proof was unnecessary, as the defendant had given notice of a defence and was present to sustain it. The judge, however, ruled that such proof was necessary, and in its absence declined to hear the plaint, though requested by both sides to do so, and nonsuited the plaintiff with costs.

Nasmith obtained a rule (1) calling upon the judge and the defendant to shew cause why the judge should not proceed to hear and determine the plaint, and why all proceedings under the order for payment of the defendant's costs should not be stayed.

Holker, Q.C., shewed cause. Notwithstanding the defendant's appearance when the plaint was called on, the judge was right in requiring proof of personal service of the summons. The course pursued by the judge was adopted by him for the purpose of defeating a practice which has extensively prevailed in the county courts, of making the provision in question a means of aggravating the costs of the proceedings.

Nasmith was not called upon to support the rule: but he asked for costs.

KEATING, J. I am of opinion that the rule should be made absolute. It appears that the defendant was served with a summons under s. 2 of the 30 & 31 Vict. c. 142, in the form given in sched. B. That summons is required to be served personally on the defendant; and, upon proof by affidavit of such personal service, the defendant having failed to give notice of his intention to defend, the plaintiff is entitled to have a judgment by default. In this case, however, the defendant did give notice that he intended to defend; and at the return day of the summons he attended with his attorney for the purpose of making his defence. If the defendant had not appeared, the plaintiff would have been bound to prove the service of the summons in the manner prescribed by the Act. But the appearance of the defendant dispensed with that; and the judge ought to have required the plaintiff to prove his case in the ordinary way. He did not take that course: but, in order to dis-

(1) Under 19 & 20 Vict. c. 108, s. 43.

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courage a practice which is said to have prevailed in abuse of this special process, he thought fit to require the plaintiff to produce an affidavit of personal service of the summons; and, that affidavit not being forthcoming, he nonsuited the plaintiff without a hearing, and ordered him to pay the defendant's costs. I think, under the circumstances, the judge had no right to require proof of personal service. If there be any improper practice, the correct mode of repressing it would be so to deal with the costs as to make it inexpedient to have recourse to it. The learned judge has evidently acted with a perfectly bonâ fide desire to perform his duty: he only wishes for the sanction of this Court for his future proceedings. I see no ground, therefore, for visiting the learned judge with the costs of this rule, even if costs were asked by the rule, which they are not.

MONTAGUE SMITH and BRETT, JJ., concurred.

Rule absolute.

Attorney for plaintiff: *T. Angell.*
Attorney for defendant: *H. Earle.*

JOHN *v.* BACON.

May 4.

Negligence—Carrier of Passengers for Hire—Liability for the acts of Others.

A. agreed to carry B. from M. to L.: the mode of transit provided was that B. should come on to a hulk lying in the harbour at M., and wait till a steamer came and took him to L. On the hulk, close to a ladder down which B. had to pass to reach the steamer, was a large hatchway, which was negligently left unguarded and improperly lighted, and B. fell through it and was injured. The hulk belonged to a third party, and A. had only acquired a right to use it for the purpose of embarking passengers on his steamer. In an action by B. against A. for the injury he sustained:—

Held, that A. was answerable for all injury occurring through the means of transit being improper, whether it arose from the negligence of his own servants or of other parties who helped to provide the means of transit.

Held, also (Brett, J., doubting), that A., having invited B. on to the hulk, was bound to protect him from concealed dangers, and was liable for injury he sustained through the condition of the hatchway, even though it was under the care of others and not his own servants.

THIS was an action against the defendant for negligently carrying the plaintiff from Milford Haven to Liverpool, whereby he was injured.

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The case was tried before Channell, B., at the Pembroke summer assizes, 1869, when it appeared that the defendant was part owner of a line of steamers which ran from Haverford West to Liverpool, calling at Milford Haven. Passengers embarking at Milford Haven went on board a hulk lying in the harbour, either by boats or by a small steamer provided by the defendant and his co-proprietors, no charge for which was made. They obtained their tickets on the upper deck of the hulk, and upon the steamer for Liverpool coming up, descended by a ladder to the main deck, from which they got on board the steamer. On the evening in question, the plaintiff, in descending the ladder, fell down a hatchway which was close to its foot, and which had been negligently left open and unprotected. The hulk belonged to a Mr. Williams, under an agreement with whom the defendant and his co-proprietors were entitled to use it for the purpose of embarking and disembarking their passengers. There was no evidence to shew whether the hatchway was under the control of the defendant's servants or those of Williams, the servants of each being on board the hulk; the defendant undertook by the agreement to light the hulk; but the jury were divided in opinion whether it was or was not insufficiently lighted, and the question, therefore, became unimportant. A time-bill of the defendant, which contained a notice that the owner of the steamboat would not be liable for accidents occurring on board the hulk was put in by the plaintiff, to shew the time of starting of the steamers, but no evidence was given by the defendant that it had been seen by the plaintiff before the accident.

The jury found that the accident occurred through the hatchway being negligently left so near the ladder open and unprotected, and that the plaintiff was not guilty of contributory negligence.

A verdict was thereupon entered for the plaintiff, subject to a special case, to be stated to obtain the opinion of the Court, whether on these facts the defendant was liable.

H. Allen having obtained a rule for a new trial, on the ground that the verdict was against the weight of evidence, and that the jury ought to have found that the plaintiff was guilty of contributory negligence, it was agreed to abandon the special case and argue with the rule the points intended to be raised by it, viz., first,

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whether there was evidence that the state of the hatchway arose from the negligence of the defendant's servants; secondly, whether the defendant was liable if it arose from the negligence of the servants of the owner of the hulk; and thirdly, whether the defendant was protected by the notice in the time-table.

The arguments and judgments on the second question are alone given; the judgments on the other points depending entirely on the special facts of the case.

J. Bowen, and *De Rutzen*, for the plaintiff. The defendant having agreed to carry the plaintiff safely to Liverpool, was bound to provide safe means of transport, and bound therefore to keep the hulk in a reasonably safe state for passengers. This has been expressly decided in *Great Western Ry. Co.* v. *Blake* (1), which was confirmed by *Buxton* v. *North Eastern Ry. Co.* (2); and the older case of *Muschamp* v. *Lancaster and Preston Junction Ry. Co.* (3), is to the same effect.

[MONTAGUE SMITH, J. The recent case of *Francis* v. *Cockrell* (4) seems to be the same in principle.]

Even independently of the contract the defendant would be liable on account of his express invitation to the plaintiff to go there. He had servants on board, and even though the control of the hatchway was in Williams, he ought not to have invited the plaintiff near a concealed danger without giving him warning, or otherwise protecting him; the doctrine of liability for concealed dangers does not apply only where the property in question is under the exclusive care of the defendant: *Pickard* v. *Smith* (5); *Martin* v. *Great Northern Ry. Co.* (6)

Quain, Q.C., *H. Allen*, and *C. E. Coleridge*, for the defendant. The case of *Great Western Ry. Co.* v. *Blake* (1), was not decided upon the ground that a railway company is liable for the negligence of third persons causing injury to their passengers, but on the ground of the working agreement, which in that case existed between the two companies, and which made the servants of the South Wales Railway Company, whose negligence caused the accident, in effect

(1) 7 H. & N. 987; 31 L. J. (Ex.) 346.
(2) Law Rep. 3 Q. B. 549.
(3) 8 M. & W. 421.
(4) Law Rep. 5 Q. B. 184.
(5) 10 C. B. (N. S.) 470.
(6) 16 C. B. 179; 24 L. J. (C.P.) 209.

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the servants of the defendants. The liability of a railway company in respect of goods and passengers is different; in the case of goods, they are insurers, but they are not in the case of passengers; with respect to them, they are only liable on account of the negligence of themselves or their servants. In *Buxton* v. *North Eastern Ry. Co.* (1) the decision resulted from an erroneous view of *Great Western Ry. Co.* v. *Blake.* (2) In *Francis* v. *Cockrell* (3), the stand was under the sole control of the defendants, and they were liable on account of their invitation to the plaintiff to come on to a dangerous place. The defendants are not liable in this case on account of their invitation to the plaintiff, for the hatchway which caused the injury was not under their control. The hulk was, in a sense a public place, used for various purposes, and its owner was the person who was responsible for its state, and his negligence will not affect the defendants. This case is similar to those in which a contractor has been sought to be made responsible for the acts of his sub-contractor, such as *Steel* v. *South Eastern Ry. Co.* (4), and *Reedie* v. *London and North Western Ry. Co.* (5) In *Pickard* v. *Smith* (6), the cover of the hole had been removed by the direction of the defendant, who was therefore clearly liable.

De Rutzen referred to *Burrows* v. *March Gas Co.* (7), on the question of joint occupation.

BOVILL, C.J. There is abundant evidence that the injury occurred from negligence in leaving the hatchway open and unprotected, and the question is whether the defendant was responsible for it. He was a carrier of passengers for hire from Milford to Liverpool, and the mode in which the transit was performed was by a small steamer conveying the passengers from the shore to the hulk; there they took their tickets at a box on the upper deck, and they remained often a considerable time on board the hulk till a larger steamer came to convey them to Liverpool; they then descended by a ladder to the main deck of the hulk in order

(1) Law Rep. 3 Q. B. 549.
(2) 7 H. & N. 987; 31 L. J. (Ex.) 346.
(3) Law Rep. 5 Q. B. 184.
(4) 16 C. B. 550; 24 L. J. (C.P.) 209.
(5) 4 Ex. 244.
(6) 10 C. B. (N. S.) 470.
(7) Law Rep. 5 Ex. 67.

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to embark on board the steamer. The defendant and his co-owners had taken means to procure the use of the hulk for the purpose of embarking their passengers, and though they had not the exclusive use of it, they were entitled under their agreement with the owners to have it arranged to their satisfaction for that purpose. The plaintiff was a passenger, and had taken his ticket on the hulk, and on the steamer arriving, there was, it appears to me, a distinct invitation to him to descend the ladder; the ladder was dangerous by reason of a hole at its foot, which was not in any way protected, and the plaintiff, as the jury have found, without negligence, fell through it and was injured. The case seems to me to fall within the principle of *Pickard* v. *Smith*. (1) The plaintiff was invited into a trap of which the defendant was aware, and which was in a place of which the defendant had the use, if not the sole control; under these circumstances the defendant was, I think, responsible, independently of any contract to carry the plaintiff safely. But further, I think there was, by the issuing of the ticket, a contract with the plaintiff to carry him safely to Liverpool; and that, therefore, independently of any occupation of the hulk, the defendant was responsible for an injury arising from want of due care. In this view, the cases of *Great Western Ry. Co.* v. *Blake* (2) and *Buxton* v. *North Eastern Ry. Co.* (3), are authorities directly in point. In the former case the servants of the South Wales Railway Company, through whose negligence the accident happened, were in no sense servants of the Great Western Railway Company. I was counsel in the case, and though the facts are not very fully stated in the report, I know that the agreement between the companies, though it related to passenger traffic, had no relation to the goods engine of the South Wales Railway Company, which was the cause of the accident; the case was substantially decided on the ground that there was a contract with the plaintiff that he should be carried throughout the journey for which the ticket was issued with reasonable care. This is confirmed by the case of *Buxton* v. *North Eastern Ry. Co.* (3), and the doctrine has been carried still further in *Francis* v. *Cockrell* (4), in which it was

(1) 10 C. B. (N. S.) 470.
(2) 7 H. & N. 987; 31 L. J. (Ex.) 346.
(3) Law Rep. 3 Q. B. 549.
(4) Law Rep. 5 Q. B. 184.

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held that the defendants, by their contract to admit the plaintiff to the stand, warranted that due care had been used in the construction of it.

KEATING, J. I am of the same opinion. It seems to me that, within the cases which have been decided and acted upon for some time, the defendant is clearly liable. He held out an invitation, as it has been called, to the defendant to come on board the hulk, in which he had, though not an exclusive yet, a sufficient occupation to make it his duty to see that the plaintiff did not run any improper risk from negligence on the defendant's part or that of other persons, as far as he could control it. The plaintiff met with this accident in consequence of the existence of an open hatchway of unusual dimensions unfenced within three feet of the ladder down which he had to pass to get to the defendant's steamer; that would, I think, be sufficient to make the defendant liable within the cases referred to by my Lord. But I also agree with what my Lord has said with respect to the defendant's contract to carry the plaintiff from Milford Haven to Liverpool. It was clearly during the course of the transit that the accident occurred through the negligence either of the defendant's servants or those of the owners of the hulk, and within the authority of *Great Western Ry. Co.* v. *Blake* (1), it does not matter which. Certainly that case was not decided on the ground suggested by Mr. Quain, but on the ground that the defendants, by their contract with their passengers, had undertaken that due care for their safety should be used during the whole course of their journey. My Lord was engaged as counsel in the case, and I was one of the judges by whom it was decided, and my recollection confirms my Lord's that that was the ground and the only ground on which it was decided, although some references were made to the agreement between the companies, which, however, were not intended to state the ratio decidendi, but only to call attention to some prominent facts in the case.

MONTAGUE SMITH, J. I am of the same opinion. I think it is unnecessary to decide whether the hulk was in the possession and under the exclusive control of the defendant: it was clearly used

(1) 7 H. & N. 987; 31 L. J. (Ex.) 346.

by him for the embarkation of passengers, and that under the control of his servants; and if the defendant had merely held out this as a place where passengers could take tickets and embark, that would make him responsible for a hidden danger, which this clearly was, within the principle of *Indermaur* v. *Dames* (1) and other similar cases.

But I also think that in this case there was a contract by the defendant to carry the plaintiff from the shore at Milford Haven to Liverpool, and if so, it must have been part of that contract that due care should be used in the whole transit, and it is immaterial whether the defendant employed other persons to assist in the conveyance of the passengers; the passenger is entitled to the exercise of due care throughout. It is, in one sense, an impersonal obligation on the defendant that due care should be used in providing ships and other means of transport, and in the management of them. This is established by a series of decisions, of which *Great Western Ry. Co.* v. *Blake* (2) is one. The recent case of *Francis* v. *Cockrell* (3) has carried the obligation into other matters besides that of carriers. That was a case where the defendants had invited the plaintiff to come upon a stand which had been improperly constructed; there was no personal negligence on the part of the defendants, but it was held that they were liable, and in the judgment the case is likened to that of carriers. In the case of *Readhead* v. *Midland Ry. Co.* (4) the point is also discussed, and it is there said, that there is no absolute warranty of safety by a carrier of passengers, but that the warranty is that due care shall be used, and it is put impersonally, so that when the carriers with whom the contract is made do not carry the whole way, but contract with others to do part of that which they have undertaken, the warranty must be, that due care shall be used by those others, and that the carriages or other means of conveyance have been constructed with due care. I think, therefore, on this ground also, the defendant is liable.

BRETT, J. I do not feel at all satisfied that the control of the defendant over the hulk was such as in itself to render him respon-

(1) Law Rep. 2 C. P. 311.
(2) 7 H. & N. 987; 31 L. J. (Ex.) 346.
(3) Law Rep. 5 Q. B. 184.
(4) Law Rep. 2 Q. B. 412.

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sible for the acts of the owners of the hulk or their servants. He had no such control, it seems to me, as would make him liable for their acts, as a master is liable for the negligent acts of his servants. I doubt whether any invitation, which does not amount to a contract or to a false and fraudulent misrepresentation, can be the foundation of a legal liability. If the contract of carriage in this case did not cover the hulk, I should very much doubt whether the defendant was liable. I feel perfectly clear, however, that the contract of the defendant was to carry the plaintiff from the shore at Milford Haven to Liverpool, and that the hulk therefore was part of the means of transport, and that it was the improper state of this, the result of negligence, which caused the accident, and if so, I think the defendant was responsible whether its state was caused by the negligence of his own servants or of other persons. It seems to me that *Great Western Ry. Co.* v. *Blake* (1), as I gather the reasons of the decision from the judgment of the Lord Chief Justice and my Brother Byles, is an authority for that; and I think that it has been authoritatively explained, as laying down that principle in *Buxton* v. *North Eastern Ry. Co.* (2), which is also an authority for the decision at which we have arrived in this case. I quite agree with my Brother Montague Smith that *Francis* v. *Cockrell* (3) is a strong authority, that in such a case as this there is what is called a warranty, but which is really a contract, that no part of the road shall be defective through negligence. I think, therefore, that our judgment should be for the plaintiff.

Judgment for the plaintiff.

Attorneys for plaintiff: *Prior & Bigg, for J. Price, Haverfordwest.*

Attorney for defendant: *J. H. Lydall, for T. & T. Martin, Liverpool.*

(1) 7 H. & N. 987; 31 L. J. (Ex.) 346. (2) Law Rep. 3 Q. B. 549.
(3) Law Rep. 5 Q. B. 184.

EDWARDS *v.* THE LONDON AND NORTH WESTERN RAILWAY COMPANY.

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May 7.

Master and Servant—Principal and Agent—Responsibility of a Railway Company for the Acts of their Servants.

A foreman porter in the service of a railway company, who, in the absence of the station master, is in charge of a station, has no implied authority to give in charge a person whom he suspects to be stealing the company's property; and, if he gives in charge on such suspicion an innocent person, the company are not liable.

DECLARATION, for that the defendants did unlawfully assault and beat the plaintiff, and cause him to be arrested and taken to and kept in a police-station until taken before a magistrate, when he was discharged. Claim 500*l.*

Pleas: 1. Not guilty. 2. A justification, on suspicion of felony. Issue thereon.

The cause was tried before Hayes, J., at the Liverpool summer assizes, 1869, when the following facts were proved:—The plaintiff was in the employ of the defendants, in the capacity of gateman at their Canada Dock station in London. He had been in the company's service about seventeen years. He occupied a cottage belonging to the company, and whilst in the company's service he had permission to carry by train any goods he might want for his own use. Having obtained some pieces of old timber from a timber-yard adjoining the station, for the purpose of building a pig-stye, and had them sawn into boards, he placed them in a break-van for the purpose of having them carried to his cottage. As he was about to start, one Holmes, who was the foreman porter having the general superintendence of the station yard in the absence of the station master, gave him into the custody of a policeman for stealing the timber, and, when he had been taken to Bridewell, attended and charged the plaintiff with stealing timber belonging to the company. This occurred on Saturday the 1st of May, and the plaintiff was detained in custody until the following Monday, when he was taken before a magistrate and discharged; Holmes appearing to substantiate the charge. On the following Friday, the plaintiff was dismissed from the company's service.

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It was submitted for the defendants, on the authority of *Poulton* v. *London and South Western Ry. Co.* (1), that there was no evidence to charge them with responsibility for the plaintiff's imprisonment.

The learned judge left it to the jury to say whether the defendants had sanctioned Holmes's conduct in making the charge. The jury found that they had, and returned a verdict for the plaintiff, damages 100*l.*, leave being reserved to the defendants to move to enter a nonsuit, if the Court should be of opinion that there was no evidence of authority on the part of the defendants to Holmes to arrest the plaintiff on a charge of felony, or of any ratification or adoption by them of his act.

Aspinall, Q.C., in Michaelmas Term last, obtained a rule nisi accordingly.

Littler and *M'Connell* shewed cause. Holmes being a person having authority at the station to control and regulate the ordinary business of the yard, must be deemed in law to have been acting within the scope of that authority in giving one of the company's servants into custody for a felony committed or reasonably suspected upon the company's property. The company must be assumed to authorize one in such a position to do all acts necessary for the conduct of their business and for their benefit and the protection of their property; and they are responsible for any acts done by him within the scope of that authority, express or implied: *Seymour* v. *Greenwood* (2); *Limpus* v. *London General Omnibus Co.* (3); *Barwick* v. *English Joint-Stock Bank.* (4) And this was a matter which required prompt action. If not taken at once, the offender might escape.

[MONTAGUE SMITH, J. This could hardly be said to be an act done for the benefit or in furtherance of the business of the company.]

In *Poulton* v. *London and South Western Ry. Co.* (1), the act complained of could in no sense be said to be within the scope of the station-master's authority, inasmuch as the matter in respect

(1) Law Rep. 2 Q. B. 534.
(2) 7 H. & N. 355; 30 L. J. (Ex.) 189, 327.
(3) 1 H. & C. 526; 32 L. J. (Ex.) 34.
(4) Law Rep. 2 Ex. 259.

of which he assumed to act was not within the bye-laws of the company. At all events, there was some evidence that the acts of Holmes were ratified and confirmed by the company. It was, of course, impossible for the plaintiff to prove that Holmes attended at the police-court under the orders of the company. But it is fair to presume that he could not have gone there without his employers' permission: and the prompt dismissal of the plaintiff without any assignable cause, after seventeen years' service, strengthens the presumption that Holmes's acts were adopted by the company. The cases of *Eastern Counties Ry. Co.* v. *Broom* (1) and *Moon* v. *Towers* (2) are plainly distinguishable. In neither of them was there anything done by the defendants to manifest a ratification or approval of the act of their servants. In *Giles* v. *Taff Vale Ry. Co.* (3), Jervis, C.J., says, in a passage cited in *Goff* v. *Great Northern Ry. Co.* (4), that "it is the duty of a company carrying on business to leave upon the spot some one with authority to deal on behalf of the company with all cases arising in the course of their traffic as the exigency of the case may demand."

Aspinall, and *Edwards*, in support of the rule. The act of Holmes, the foreman, was not within the scope of his authority; and there was no subsequent ratification.

[KEATING, J. There clearly was no evidence of ratification.]

A servant of a railway company has no implied authority as such to give a person into custody on a charge of felony. It is the duty of any one who sees a person committing a felony to give him into custody; and it cannot be assumed that Holmes was acting in this matter as the company's servant, and not in accordance with that general duty. If the defendants are held liable here, it will follow that every servant has authority to act in this way for his master, and to render him liable should he arrest a man wrongfully. It is said that Holmes was in charge of the property which he believed was being stolen, and that from that fact it may be inferred that he had authority to act as he did; but the same would apply to a shopman in charge of a shop, or a servant in charge of a house, and yet it has never been suggested that if

(1) 6 Ex. 314; 20 L. J. (Ex.) 196.
(2) 8 C. B. (N. S.) 611.
(3) 2 E. & B. 822; 23 L. J. (Q.B.) 43.
(4) 3 E. & E. 672; 30 L. J. (Q.B.) 148.

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such a servant gave a person in charge for felony the master would be liable. In all the cases in which railway companies have been held liable the offence for which the person aggrieved has been given in charge has been an infringement of the company's bye-laws. In such a case the servant would have no right to act, except as a servant of the company, and it must therefore be assumed that he intended to act as such; nor could such bye-laws be enforced at all, except by the servants of the company so acting, and it must be presumed, therefore, that the company had given them authority to do so. This was the ground of decision in *Goff* v. *Great Northern Ry. Co.* (1) and *Poulton* v. *London and South Western Ry. Co.* (2) The principle which governs these cases is explained in the judgment of Willes, J., in *Barwick* v. *English Joint-Stock Bank.* (3) If the company made one of their servants a policeman, that might be an additional fact for the jury, and some evidence that they intended him to arrest such persons as he suspected of committing a crime; but there is no such fact in this case.

KEATING, J. This was an action brought against the London and North Western Railway Company, in consequence of one of their servants having given the plaintiff into custody. The verdict was for the plaintiff, but leave was reserved to enter the verdict for the defendants, on the ground that there was no evidence of authority to their servant to arrest the plaintiff, nor any evidence of subsequent ratification. It appears that Holmes was a foreman porter, and although he was not the superior officer at the station, he was the highest in position who was there at the time in question; and, under the impression that the plaintiff was stealing some timber belonging to the company, he gave him into custody on that charge. The plaintiff was acquitted of the charge, and brought this action against the company for assault and false imprisonment. There is no evidence in the case of anything like express authority being given by the defendants to Holmes, and if there is any evidence to fix the defendants, it must be upon an implied authority resulting from Holmes's position as their servant; and

(1) 3 E. & E. 672; 30 L. J. (Q.B.) 148. 7 Jur. N. S. 286

(2) Law Rep. 2 Q. B. 534.

(3) Law Rep. 2 Ex. 259, 265.

that raises, broadly, the question, whether a person in the position of Holmes has implied authority to give into custody any one whom he suspects to have stolen his master's goods. I think there is no such implied authority. It is admitted that the point is new, and that there is no case in which such an authority has been assumed to exist. The cases that have been referred to in support of the contention, are cases where a company has made bye-laws and an Act of Parliament has given authority to the company's servants to apprehend persons committing offences against the bye-laws, it has been held that under such circumstances the servant may be considered to have authority to enforce the bye-laws and to do whatever is necessary for that purpose.

That is the limit to which the cases have gone, and it seems to me that it would be carrying the doctrine much further to hold that the defendants were liable in this case. There seems no ground for saying that what was done was in the ordinary course of the business of the company, nor that it was for their benefit, except in so far as it is for the benefit of all the Queen's subjects that a criminal should be convicted. If Holmes acted from a sense of the duty which rests on every one to give in charge a person whom he thinks is committing a felony, his conduct would in no way be connected with the defendants.

It has been argued that if there was no implied authority to Holmes, still there was evidence of a ratification of his acts by the defendants, but the Court has intimated in the course of the argument, that they thought there was no evidence of any such ratification. In order that there may be a valid ratification, there must be both a knowledge of the fact to be ratified and an intention to ratify it; in this case there is no evidence on either point. I think, therefore, the rule should be made absolute to set aside the verdict for the plaintiff, and enter a nonsuit.

MONTAGUE SMITH, J. I am of the same opinion. There is no evidence whatever on which a presumption of authority from the defendants to apprehend the plaintiff can be founded, except the fact that the person who authorized his apprehension was a foreman porter, and in charge of the station at the time when the plaintiff was supposed to be stealing the defendants' property. I

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think an authority to apprehend the plaintiff cannot be presumed to have been conferred on the foreman in this case. No doubt if, in furtherance of the particular business of the company, it is necessary to arrest a person, the servants of the company have an implied authority to do it, thus, if there is a bye-law of the company, and power to arrest any person infringing it, it must be presumed that the company give authority to any one they put in charge of the station so to enforce it, since this can only be done by the company's servants on the spot. Here, however, the cause of the arrest was not at all connected with the company's business, and it cannot, I think, be presumed that the company give authority to their servants generally to apprehend any person whom the servants think is committing a felony, even though on the company's property. It is clear, too, that Holmes might act for himself in furtherance of public justice without any authority of the company. I am by no means prepared to say that there may not be officers who, from the special circumstances of their appointment, have power to arrest offenders in the name of the company; for example, policemen appointed by the company to watch their stations; so a superior officer may have a right to exercise all the power which the company would have under the circumstances; but I have no wish to express any opinion on these points. I confine myself to the facts of this case, and it does not seem to me that the acts of Holmes were within the scope of his authority. I entirely agree, also, that there was no evidence of ratification of them by the defendants.

BRETT, J. I am of the same opinion. There is certainly no evidence of any express authority to the person who took the plaintiff into custody to do so, nor any evidence of ratification of his acts by the defendants. The case, therefore, is put on an authority implied from the course of business. I will assume that Holmes was the person who had the control of the station-yard, so as to have the control of anything done there in the ordinary course of business; but I think that this was not so done. It was pointed out by Blackburn, J., in *Poulton* v. *London and South Western Ry. Co.* (1), that it is not enough that the act should be

(1) Law Rep. 2 Q. B. 534.

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for the benefit of the master, but it must be in the ordinary course of business in order that an authority to do it may be implied. In the case of a person being arrested for breaking the company's bye-laws, it may well be said that that is the way in which the company carry on their business, and similarly, if an officer be appointed expressly to watch the company's property, I should think, if he took an innocent person into custody on the charge of stealing, it might well be said that the company were liable; but in this case the company had not, I think, authorized Holmes to protect their goods by giving into custody any one he thought right, and it was not their ordinary way of carrying on their business.

Rule absolute to enter a nonsuit.

Attorney for plaintiff: *R. W. Roberts.*
Attorney for defendant: *Blenkinsop.*

[IN THE EXCHEQUER CHAMBER.]

May 11.

BRIDGES *v.* GARRETT.

Principal and Agent — Authority of Agent to receive Money — Payment by Crossed Cheque, which included several Sums due to different Persons.

The defendant purchased copyhold land in the plaintiff's manor, and was admitted by C., who had been appointed by the steward of the manor as his deputy to admit the defendant. C. also acted as the defendant's attorney in completing the purchase. Nine days afterwards, the defendant gave C. a cheque for 87*l.* 10*s.* 8*d.*, viz. 78*l.* 15*s.* for the lord's fine, 4*l.* 11*s.* 8*d.* steward's fees, and 4*l.* 4*s.* C.'s own charges as the defendant's solicitor. This cheque was crossed by the defendant, at the request of C., to C.'s bankers. The cheque was duly paid by the defendant's bankers to C.'s bankers, and they retained the money in discharge of a debt due to them by C., who had overdrawn his account.

In an action by the plaintiff against the defendant to obtain payment of the fine due:—

Held (reversing the judgment of the Common Pleas), that there was evidence for the jury to support a finding that the payment of the fine to C. was a valid payment to the lord.

APPEAL against a decision of the Court of Common Pleas, making absolute a rule to enter a verdict for the plaintiff. (1)

(1) Law Rep. 4 C. P. 580.

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The action was brought by the plaintiff, the lord of the manor of Cressing Temple, in Essex, to recover 78*l.* 15*s.* for a fine payable to him by the defendant on admission as tenant to a copyhold of the manor. The defendant pleaded, amongst other pleas, payment. The defendant was admitted on the 4th of June, 1867, by one Craig, who had been appointed by one Mills, the steward of the manor, to act as his deputy for that turn. Craig acted as the defendant's attorney in the purchase of the land.

On the 13th of June, the defendant drew and gave to Craig, in London, a cheque for 87*l.* 10*s.* 8*d.*, being the aggregate amount of the following sums, viz. 78*l.* 15*s.* for the lord's fine, 4*l.* 11*s.* 8*d.* for the steward's fees, and 4*l.* 4*s.* for Craig's own charges as the defendant's solicitor. At the request of Craig, the defendant crossed the cheque with the name of Craig's bankers in London, and on the same day Craig paid it in there to the credit of his own private account.

The cheque was duly paid by the defendant's bankers to Craig's bankers, and was credited by the latter to Craig's account; but, as Craig had overdrawn his account beyond the amount of the cheque, his bankers refused to pay any part of the proceeds of the cheque, and applied them in satisfaction of Craig's overdrawn account. Craig shortly afterwards became insolvent.

Mills, being informed of the payment to Craig, repudiated Craig's authority to receive the fine and fees, though he conceded that he had authority to take the admittance.

At the trial it was left to the jury to say "whether Craig had, under the circumstances, express or implied authority to receive the fine on behalf of the lord, in the manner and form in which he did receive it." The jury answered that question in the affirmative, and found for the defendant on the plea of payment; and leave was reserved to the plaintiff to move to set aside that verdict and to enter a verdict for himself for 78*l.* 15*s.*, the amount of the fine, if the Court should be of opinion that there was no evidence to support the plea of payment,—the Court to be at liberty to draw inferences of fact. A rule was accordingly obtained in Easter Term, 1868, and afterwards made absolute by the majority of the Court of Common Pleas,—Byles, J., dissenting.

Denman, Q.C. (*Cohen* with him), for the defendant. The autho-

rity of Craig, as deputy-steward, clearly extended to the doing of all such acts as the steward himself could have done; and a payment of the fine in money to Craig would have been good as against the plaintiff. The only question is, whether the payment by means of the crossed cheque was a payment to the plaintiff. It was for the jury to say whether there was anything in the mode of payment to make it inoperative as against the lord. It was hardly contended in the Court below that Craig would not have been justified in receiving the fine and fees at the time of the admittance. If, therefore, it was a question for the jury, their finding has disposed of it. The judgment of the majority of the Court, as to the mode of payment, is founded upon a fallacy, viz. that a payment by cheque is not a good payment. Where, however, as here, the cheque is honoured, it is obviously the same as a payment in money. Whether the question be one of fact for the jury, or of law for the Court, therefore, the defendant is entitled to retain his verdict. *Catterall* v. *Hindle* (1) and *Williams* v. *Evans* (2) were cited.

Garth, Q.C. (*J. Digby* with him), for the plaintiff. Mills, the steward, had no power to delegate to Craig authority to receive the lord's fine. The only authority conferred upon Craig was to take the admittance of the defendant,—a mere ministerial act. At all events, assuming that Craig might lawfully have received the fine and fees at the time of the admittance, he clearly had no right to receive them at a subsequent period; nor could his authority extend to the receipt of them in such a shape as would preclude him from handing over to the lord the amount of the fine as he received it. The following authorities were cited:—*Parker* v. *Kett* (3); Gilbert on Tenures, 366, 414; Perkins's Profitable Book, 21; 2 Sheppard's Touchstone, 239; Lord St. Leonards' Handy Book, 42; Story on Agency, ss. 98, 181; *Vandeleur* v. *Blagrave* (4); *Viney* v. *Chaplin* (5); *Sykes* v. *Giles* (6); *Barker* v. *Greenwood* (7); *Williams* v. *Evans.* (2)

(1) Law Rep. 1 C. P. 186; in error, Law Rep. 2 C. P. 368.
(2) Law Rep. 1 Q. B. 352.
(3) 1 Ld. Raym. 658; 1 Salk. 95; 12 Mod. 467.
(4) 17 L. J. (Ch.) 45.
(5) 27 L. J. (Ch.) 434.
(6) 5 M. & W. 645.
(7) 2 Y. & C. Ex. 414.

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Denman, Q.C., in reply.

COCKBURN, C.J. I think there was evidence in this case which entitled the jury to find for the defendant. There were four questions for consideration. The first was, whether Craig, who was appointed deputy-steward for the purpose of taking the admittance of the defendant, was, as such deputy-steward, authorized to receive the money which the defendant was bound to pay on his admittance. It seems to me that Mills, as steward, was entitled to receive the fine on behalf of the plaintiff; and, in the absence of any authority to the contrary, I think that, when he appointed Craig as his deputy to take the defendant's admittance, he authorized Craig to do all that he himself had authority to do. Then comes a question of more difficulty, viz. whether the authority of Craig was a continuing one until the money was paid or until the authority should be revoked. That, as it seems to me, was a question of fact which was to be determined by a consideration of all the circumstances of the case. The third question is whether the payment was made to Craig in his character of deputy-steward, or whether the cheque was handed to Craig as the defendant's solicitor, for the purpose of applying the proceeds in payment of the lord's fine, the steward's fees, and his own professional charges. That, again, is a question of fact to be judged of by a reference to all the circumstances of the case. Then comes the last question, —whether the payment discharged the defendant as against the plaintiff, or whether the form and mode of it was such as to render it invalid. There is no doubt that, where an agent is authorized to receive money for his principal, he cannot allow it by way of set-off in accounts between the payer and himself: he must receive it in money. If, however, payment is made by cheque, and the cheque is duly honoured, that is a payment in cash. There is nothing in the circumstance of a cheque being given which invalidates the payment. The present case, however, is a little complicated by the fact of the cheque having been crossed. It appears that the defendant, at Craig's request, crossed the cheque with the names of Craig's bankers. Craig's bankers got the cheque cashed, and carried the amount to the credit of Craig's account with them. If Craig's account had not been overdrawn, he would

have had the money. The cheque, therefore, was in point of fact money. It was the same thing as if the defendant had paid the amount to Craig in cash, and Craig had paid in the cash to his account with his bankers, and had forwarded his own cheque to the lord or to the steward, and the bankers had, in consequence of the balance being against him, declined to honour his cheque. If Craig was authorized to receive the money, I think the payment to him was a payment to the plaintiff, and that there was nothing in the mode of payment to take the case out of the ordinary rule. I must own I should not have been surprised if on two of the questions the verdict had been the other way. But, from the form in which this case comes before us, I do not think we are entitled to say to what conclusion we should have come. The only question for us is, whether there was any evidence to support the plea of payment. For these reasons, I have come to the conclusion that the judgment of the Court of Common Pleas should be reversed.

KELLY, C.B., and CHANNELL, B., concurred.

BLACKBURN, J. I agree in thinking that the defendant was entitled to a verdict. Upon two of the questions which the jury had to consider, viz. whether the plaintiff had given authority to Mills, and whether Mills had given authority to Craig, to receive the lord's fine and the steward's fees, provided the money had been received at the time of the admittance, I should have found as the jury did. But upon the questions whether there was a continuing authority in Craig, and whether the payment was made by the defendant to Craig as deputy-steward or as his own solicitor, though there was evidence upon which the jury might find that there was such authority, I incline to think that, if this were a special case on which I had to draw conclusions of fact, the conclusion I should come to would be the other way. Then comes the question upon which alone there was a difference of opinion in the Court below. The majority of the Court thought that the payment by cheque, under the circumstances, was not sufficient. I cannot help thinking that those learned judges lost sight of the foundation of the rule upon the subject of payment through an agent. Where the person employed to receive the money is a clerk or servant, he must

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receive it himself, and must hand over the money as he receives it. For instance, bankers' and merchants' clerks employed to carry money are not trusted on the ground of their solvency. If a banker's clerk employed to receive money were to delegate to another the duty of receiving it for him, those who paid the money to the person so delegated would do so in their own wrong, and incur the peril of being called upon to pay it over again. The trust in that case is a mere personal one. But, where the authority given is, to receive the money, and then, not to hand it over in specie, but to pay over an equivalent sum, the case is very different. If a servant intrusted with his master's money becomes bankrupt, the money would not belong to his creditors. But, where an attorney or commercial agent is employed to receive money, to be paid over to his principal the next day, it would, I think, in the event of the bankruptcy of the attorney or agent whilst the money remained in his hands, form part of his general assets. Where the person to whom the money is paid stands in the relation of a clerk or servant, the payment to him, whether in cash or by a cheque which is afterwards paid, is a good payment to the principal. That which took place here, however, was no more than if the defendant had paid in the money to Craig's bankers. That would have rendered Craig liable to the plaintiff for the amount of his fine, and would have discharged the defendant; and the fact of Craig's account being at the time overdrawn would have made no difference. I agree with my Brother Byles in thinking that the payment in question was a good payment of the fine to the plaintiff.

MELLOR, J. I also think the judgment of the Court below should be reversed. I agree that there was evidence for the jury; though I must confess that my own impression would have been in favour of a verdict the other way. I entirely concur in what has fallen from my Brother Blackburn upon the point on which there was a difference of opinion in the Court below.

LUSH, J., and CLEASBY, B., concurred.

Judgment reversed.

Attorneys for plaintiff: *Ward, Mills, & Witham.*

Attorneys for defendant: *Monckton & Monckton.*

COCKLE *v.* THE LONDON AND SOUTH EASTERN RAILWAY COMPANY.

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May 10.

Negligence—Railway Company—Invitation to Passenger to alight—Evidence for the Jury.

A railway train was drawn up at a station so that the last carriage was opposite to a part of the platform similar in appearance to the rest of it, but on to which persons could not alight, owing to its receding from the line of rails on which the carriage stood so that a space of about four feet intervened between it and the carriage. The train had come finally to rest, but the name of the station had not been called out. A passenger opened the carriage door without calling for assistance to the company's servants, and seeing the platform, and supposing it to be close to the carriage, stepped out, and fell and injured herself. There were lights on the other end of the platform, but not at the part where she got out; and there was evidence that it was the fault of the engine driver that the carriage was not drawn up alongside of that part of the platform on to which passengers could alight with safety. In an action against the railway company for negligence:—

Held, per Brett, J., that if the jury could reasonably say, upon the facts which were proved and might be properly inferred, that the defendants, having regard to the reasonable safety of passengers, had done something which they ought not to have done, or omitted to do something which they ought to have done, and that the plaintiff had been reasonably careful, the Court could not withdraw the case from them, and that the jury might have reasonably so said from the facts proved, or to be properly inferred, in this case.

Per Montague Smith, J., that the plaintiff was bound to give affirmative evidence of negligence, and that there was no such evidence in this case, as neither the platform, nor the mode of managing the train, were shewn to have been improper, and that, even if there were evidence of negligence, the injury did not flow from it, but from the plaintiff's voluntary act in alighting at the time and place she did.

Per Keating, J., that the case was concluded by authority. The cases shewing, first, that a passenger alighting without an invitation to do so does so at his own risk; and, secondly, that the facts proved in this case did not amount to an invitation.

Per Bovill, C.J., that the whole facts of the case were to be looked at together, and that, first, the bringing the train to a stand at a place where the plaintiff would be likely, from the imperfect light and the appearance of the platform, to suppose she might alight, was negligence on the part of the engine driver, the defendants' servant; secondly, the stopping of the train under the particular circumstances was evidence on which a jury might infer that there was an invitation to the plaintiff to alight; and thirdly, if there was such an invitation, there was no necessary imprudence in her alighting in the way she did.

DECLARATION, that, before and at the time of the committing of the grievances thereinafter mentioned, the defendants were carriers for hire on and along a certain railway, to wit, from the Spa Road

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to Deptford, in and by means of a railway train of the defendants, and in and along a railway of the defendants, and the plaintiff had become, and then was, a passenger of the defendants, to be by them, as such carriers, safely and securely carried and conveyed in and along the said railway, in and by means of the said railway train, on a certain journey, to wit, from the Spa Road to Deptford, for reward to the defendants in that behalf; yet the defendants so carelessly, negligently, and improperly conducted themselves in and about carrying the plaintiff on the said journey, and in and about the management of the said railway train, whilst the plaintiff was such passenger, that, by means of the mere carelessness, negligence, wrongful and improper conduct of the defendants in that behalf, the plaintiff was thrown and fell down whilst alighting from the carriage in which she was such passenger at the Deptford station, where the journey terminated, and was greatly hurt; with allegations of special damage.

Plea: Not guilty. Issue thereon.

The case was tried before Bovill, C.J., at the sittings in Middlesex, after Trinity Term, 1869, when the following facts were proved. The plaintiff was a passenger by a train from London to Deptford, which left London at 11.40 P.M., and travelled in the last carriage. The platform at Deptford was of sufficient length for the whole train to have been drawn up alongside of it, but in addition to the part at which passengers could alight, it extended for some distance, gradually receding from the rails on which the train approached. The train in question came to a standstill with the body of the train alongside the platform, but the last carriage was opposite the receding part of the platform at which passengers could not alight, and about four feet from it. This end of the platform was dark, but there were lights at the other end, and there was a dim light in the carriage in which the plaintiff was. There was no evidence that the name of the station was called out, but the plaintiff, on the train stopping, without calling to any of the company's servants, some of whom were within hearing, opened the door and stepped out, expecting that she should step on to the platform, but, in consequence of the distance between the carriage and the platform, she fell on to the rails instead, and was injured.

The superintendent of the station said, on seeing the accident, that

it was the fault of the engine driver that the train was not drawn up further, so that the last carriage should be alongside the platform.

On these facts the jury found a verdict for the plaintiff, and the judge reserved leave to the defendants to move to enter a nonsuit if there was no evidence which ought to have been left to the jury.

O'Malley, Q.C., having obtained a rule, pursuant to the leave reserved,

Gibbons and *Macrae Moir* shewed cause. Any omission of duty on the part of the defendants, such as not affording the plaintiff reasonable means of alighting, would render them liable in this action; and if there was any evidence of that, this rule must be discharged. In *Siner* v. *Great Western Ry. Co.* (1), Hannen, J., said: "I do not doubt that it would be negligence to bring a train to a stop in such circumstances as would lead a person to expect that there was a platform." That was exactly what happened here. In the position in which the carriage was the plaintiff could see that there was part of the platform opposite her, and, in the dim light, could not see that it did not come close to the carriage door. The circumstances, therefore, amounted to an invitation to the plaintiff to alight at a place where there was a hidden danger. In *Siner* v. *Great Western Ry. Co.* (1), the plaintiff knew that the carriage was not at the platform, and voluntarily took upon herself the risk of alighting where she did. The same remark applies to *Plant* v. *Midland Ry. Co.* (2), and *Harrold* v. *Great Western Ry. Co.* (3), in the latter of which the real question in the case was, whether the railway company were bound to fence their line at the place where the accident occurred. The case of *Foy* v. *London, Brighton, and South Coast Ry. Co.* (4) is in the plaintiff's favour, but must, perhaps, be considered to have been overruled by *Siner* v. *Great Western Ry. Co.* (1) In the case of *Bridges* v. *North London Ry. Co.* (5) the plaintiff alighted while the carriage was still in a tunnel, and

(1) Law Rep. 4 Ex. 117.
(2) 21 L. T. (N. S.) 836.
(3) 14 L. T. (N. S.) 440.
(4) 18 C. B. (N. S.) 225.
(5) *Bridges* v. *North London Ry. Co.* This was an action by a widow, under Lord Campbell's Act, to recover compensation for the death of her husband through the defendants' negligence. The facts of the case were, that a train of the defendants', in which the deceased was travelling, drew up at the Highbury station; the last carriage, in which the deceased was sitting, how-

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when he must have known he was not at the platform. In *Prager* v. *Bristol and Exeter Ry. Co.* (1) the plaintiff might have stepped on to the platform if he had taken a long step, and the position of the carriage, therefore, may not have been considered improper. Here the distance from the carriage was such that the plaintiff, stepping out, necessarily fell on to the rails.

O'Malley, Q.C., and *F. M. White*, in support of the rule. The circumstances under which a judge ought to leave a case to the jury are well laid down by Willes, J., in *Ryder* v. *Wombwell* (2); and it is clear that he should not do so unless substantial evidence is produced by the party on whom the onus of proof lies. Here, there was

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ever, being in a tunnel, which terminates at the station, and not at the platform. The name of the station was called out by a porter, and the deceased immediately got out though it was dark, and fell on to the rails and was killed. The jury expressed a strong opinion that the train having stopped, and the name of the station having been called out, the passengers had a right to presume that they might get out. Blackburn, J., before whom the case was tried, however, nonsuited the plaintiff, with leave to the defendants to move to enter the verdict for 1200*l*.

Jan. 24. *H. James, Q.C.*, moved accordingly, and contended that the defendants, having invited the deceased to alight by calling out the name of the station, were responsible for his death, and that at any rate it was a question for the jury; but the Court (Cockburn, C.J., Blackburn, Mellor, and Lush, JJ.) held, that the calling out of the name of the station did not necessarily entitle the passengers to get out; and that, under all the circumstances of the case, the deceased was not justified in doing so, and refused the rule.

(1) *Prager* v. *Bristol and Exeter Ry. Co.* This was an action for injuries received by the plaintiff, a passenger by the defendants' line, through their alleged negligence. The carriage in which the plaintiff was riding drew up opposite the platform at a part where it curved back from the line, so that there was an interval of about two feet between the carriage and the platform. The train had stopped and the name of the station been called out, and the plaintiff stepped out and fell between the carriage and the platform and was injured. A good deal of evidence was given as to the circumstances of the accident and the knowledge of the plaintiff of the peculiarities of the station. A verdict having been found for the plaintiff, a rule was obtained to enter a nonsuit on the ground that there was no evidence to go to the jury.

Prideaux, Q.C., Edlin, Q.C., and *Bowen*, shewed cause.

Sir J. Karslake, Cole, Q.C., Lopes, Q.C., and *Murch*, supported the rule.

THE COURT (Kelly, C.B., Martin and Pigott, BB.) made the rule absolute upon the special facts of the case, relying mainly upon the conduct of the plaintiff amounting to contributory negligence.

(2) Law Rep. 4 Ex. 39.

nothing in the facts which proved negligence on the part of the defendants. There was no evidence that the train would not have been drawn up further if the plaintiff had waited; and the part of the platform opposite the carriage was not a part that ever was or could be used for passengers to alight; and the fact that it was dark, while there were lights beyond, should have shewn to the plaintiff that it was not intended that she should alight. The plaintiff moreover, was clearly guilty of contributory negligence in getting out when she did; she should have waited till the name of the station had been called out, or there had been some other invitation to her to alight, or she should have, at least, called to some of the company's servants, who were proved to have been within hearing, and who, if she had waited, would, no doubt, have come to her assistance.

[BRETT, J. In the case of *Petty* v. *Great Western Ry. Co.* (1), which was heard at Manchester, and in which the circumstances

(1) *Petty* v. *Great Western Ry. Co.* This was an action brought in the Court of Exchequer for injuries received by the plaintiff, a passenger by the defendants' line, through their negligence. The train in which the plaintiff was travelling was a long one, and when it stopped at the station at which the plaintiff wished to alight, the carriage in which the plaintiff was riding was beyond the platform, and opposite a white path used by the porters for going to a signal-box, which in the dusk looked like a continuation of the platform. The train was finally stopped, and the porters having called out the name of the station both before and after it stopped, the plaintiff got out, and fell, and was injured. Willes, J., before whom the case was tried, left several questions to the jury, who found them all in favour of the plaintiff, and leave was reserved to the defendants to move to enter a nonsuit on the ground that there was no evidence to go to the jury. A rule having been obtained accordingly, and cause shewn, Martin, B., thought there was evidence, and that the rule should be discharged. Bramwell, B., thought that there ought to be a new trial, because the question had not been distinctly left to the jury whether the plaintiff really thought that the white path was the platform, considering that otherwise he ought to have seen the danger, or, if it was too dark to do so, ought not to have got out in the dark. Pigott, B., thought there was no evidence, and that the rule should be made absolute. The Court being thus divided, the case was sent down for a new trial. On the new trial, before Brett, J., the jury found that the plaintiff did mistake the path for the platform, but that he had been guilty of contributory negligence in the mode in which he got out, and the verdict was entered for the defendants. The defendants obtained a rule again for a new trial, Brett, J., having expressed himself dissatisfied with the verdict, but the case was finally settled before the rule was argued.

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were very similar to the present, Willes, J., left the case to the jury, and the Court of Exchequer refused to enter a nonsuit, but sent the case down to a new trial, that the jury might say whether the plaintiff believed that the place at which he alighted was the platform. On the second trial, before me, the jury held that he did, but that there was contributory negligence in the way in which he got out.]

Without going through all the cases, those of *Prager* v. *Bristol and Exeter Ry. Co.* (1), and *Bridges* v. *North London Ry. Co.* (2), are precisely in point.

BRETT, J. I am of opinion that there was evidence to go to the jury in this case. In order to discover if this was so, I think it is first necessary to consider what are the propositions which the judge ought to lay down to the jury in such a case as the present, and what it is which the plaintiff is required to prove. The first proposition is, that the defendants must have been guilty of negligence, and solely guilty of negligence, for a plaintiff cannot recover if he has been guilty of contributory negligence. The second proposition I think is, that the defendants have been guilty of negligence if they have done anything which, having a reasonable regard to the safety of passengers, they ought not to have done, or have omitted to do anything which they ought to have done. The third proposition is, that the plaintiff in like manner has been guilty of contributory negligence if he has done anything which, having a reasonable regard to his own safety, he ought not to have done, or has omitted to do anything which he ought to have done. These are the propositions of law which a judge should lay down to the jury. And I have a strong feeling that a judge has no right to go further in controlling the jury, but that he has a right to consider whether the facts are such that a jury could not, without acting contrary to reason, find the propositions I have stated in favour of the plaintiff; if they could not, there is no case for the jury. If they could the judge can go no further, but must leave the case to them; he has no right to act on his own opinion and interfere any more with their decision.

The first question here, therefore, is, whether upon the facts

(1) Ante, p. 460, note (1). (2) Ante, p. 459, note (5).

proved, and upon what a jury might properly infer from them, it is contrary to reason for them to have said that the company had done something which, having a reasonable regard to the safety of passengers, they ought not to have done, or have omitted to do something which, having reasonable regard to the safety of passengers, they ought to have done.

Now the facts proved at the trial were that the defendants' servant, the driver of the engine, brought the train to a standstill in such a position, that the body of the train was at a known stopping place at the station, but a part of the train was not brought up to it, and at such part it was dark. The question, therefore, is, whether on those facts and on what may be inferred from them, it was contrary to reason for the jury to say that the defendants' servants had omitted to do something which, having a reasonable regard to the safety of passengers, they ought to have done, or done anything which they ought not to have done. I think it was not contrary to reason; so far from it, that if I import into the case my own knowledge, I should say there was negligence on the part of the company's servants; but I do not think that I am authorized to do so. It is sufficient that I cannot say that it is contrary to reason to hold that there was. The second question is whether, on the facts proved and on what the jury might infer from them, it was contrary to reason for them to find that the plaintiff, having regard to what were reasonable means for her to adopt for her own safety, had done anything she ought not, or omitted to do anything which she ought, to have done. The facts are that the plaintiff, after the train stopped, opened the door and stepped out, but, there being no platform at the place, she fell and was injured. It is said that the plaintiff ought to have waited for an invitation to get out, and it is urged that she ought not to have got out till the door was opened, and ought to have called a porter for that purpose, and that if she had waited a minute or two there would have been officials ready to assist her. All these, I think, are strong observations for the consideration of the jury, but it comes back to this,—can I say on what was proved, that a finding of the jury that the conduct of the plaintiff was reasonably prudent was contrary to reason? I cannot say so, and therefore I think it was a matter for the jury to decide, and which, if I decided, I should go beyond

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my province. Therefore, apart from authority, I should have a strong feeling that it would be an usurpation of the province of the jury to direct a nonsuit in this case. Then, as to authority, *Siner* v. *Great Western Ry. Co.* (1) is the most important case; of that it is sufficient to say that it was daylight at the time of the accident, and the plaintiff knew that the carriage was not at the station; if, therefore, any accident happened from her getting out where there was no platform, she took that risk upon herself. The case of *Bridges* v. *North London Ry. Co.* (2) is much nearer, because there the accident was in the dark; but in that case the carriage was not out of the tunnel, and it seems to me consistent with the judgment in that case, that the plaintiff knew himself that he had not reached the station, and that the judges rested their judgment on the fact of such knowledge; the point argued was, that the calling out of the name of the station amounted to an invitation to the passengers to alight, and necessarily entitled the plaintiff to get out, and the Court held that it did not. After what I have said, it will be seen that I could not have agreed to the judgment in that case, because I should have thought the question was entirely one for the jury; but if the decision had depended solely on that point, I should have felt bound by it, but I think it is reconcilable with the judgment I am giving in the way I have mentioned. Now, let us see how eminent judges have treated the question: there was a case of *Whittaker* v. *Manchester, Sheffield, and Lancashire Ry. Co.* (3), tried at Manchester, in which the circumstances were very similar to the present, and in which Willes, J.,

(1) Law Rep. 4 Ex. 117.

(2) Ante, p. 459, n. (5).

(3) *Whittaker* v. *Manchester and Sheffield Ry. Co.* This was an action for injuries received through the negligence of the defendants in carrying the plaintiff, by which he was injured. The train in which the plaintiff was riding was allowed by the engine driver to overshoot the platform, so that the carriage in which he was sitting was opposite to the parapet of a bridge beyond the platform, the top of which in the dusk looked like the platform; the porters called out the name of the station, and the plaintiff having got out on to the parapet in the bonâ fide belief that he was stepping on to the platform, fell over and was injured. The case was tried before Willes, J., and the jury having found a verdict for the plaintiff, a rule was obtained for a new trial on the grounds of misdirection in leaving the case to the jury, and that the verdict was against the weight of evidence.

June 7. *Holker*, *Q.C.*, and *Lumley Smith*, shewed cause.

Davison, *Q.C.*, and *C. Crompton*, supported the rule.

refused to nonsuit the plaintiff. Again, in *Petty* v. *Great Western Ry. Co.* (1), the train was brought to a standstill in such a position that some of the carriages were short of the platform, and at a place where it was dark, the name of the station was called out, and the plaintiff got out and was injured. Willes, J., left the case to the jury, and when the case was moved in the Court of Exchequer, the Court refused to enter a nonsuit, but sent the case down for a new trial, because one question which they considered material had not been left to the jury. In that case there was the authority, therefore, of Willes, J., and the Court of Exchequer, that the question was one for the jury, and it is strongly confirmatory of the views I have expressed. I think, therefore, the rule should be discharged.

MONTAGUE SMITH, J. I think the rule ought to be made absolute. I think there was no evidence of negligence on the part of the defendants. I can find no evidence on the subject except the fact

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BOVILL, C.J. In this case there was clear evidence of an invitation to the plaintiff to alight at a dangerous place. The train was stopped, and the name of the station called out before and afterwards; it is not a matter of law, but a question for the jury, whether the calling out of the name of a station amounts under all the circumstances to an invitation to alight: the plaintiff, too, was led to believe by the form of the parapet that there was a platform for him to get out on to, which distinguishes this case from *Bridges* v. *North London Ry. Co.* (ante, p. 459, n. (5)). There was, moreover, evidence of negligence of the engine driver, in not stopping at the platform, but allowing the carriage in which the plaintiff was to overshoot it. The rule ought, therefore, to be discharged.

WILLES, J. I am of the same opinion. The substance of the case is that the defendants having agreed to carry the plaintiff safely, and afford him easonable means of alighting, through the negligence of their servants induced him to believe that he might get out at a place which was a trap, and he, getting out bonâ fide under that belief, was precipitated into a road which caused the injury. The defendants are, according to the ordinary rules of law, estopped from saying that he acted unreasonably in doing what he was led to do by their conduct. I think this case quite distinguishable from the case of *Bridges* v. *North London Ry. Co.* (ante, p. 459, n. (5)), though I must not be supposed to say that I agree with the majority of the Court in that case, remembering the necessity of keeping distinct the questions of fact and law, and I cannot now understand how it could be said as a matter of law that the calling out of the name of the station was not an invitation, since the inference to be drawn from it must depend upon all the circumstances of the case.

(1) Ante, p. 461, note.

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that the train drew up short of the platform. I do not say that there may not be circumstances under which the stopping of the train would be an invitation to the passengers to alight, but I find no evidence here except the mere fact that the train drew up; there is an entire absence of the usual evidence of an invitation to the passengers to alight, there was no calling out of the name of the station or opening of the door; in fact, nothing but the mere stopping to indicate that any one might get out. It is said that there was some evidence of negligence in the fact that the train was not drawn up to the platform, but I find Mellor, J., in *Siner* v. *Great Western Ry. Co.* (1), said: "The mere fact of the carriage, in which the plaintiffs were, being beyond the end of the platform, proves no more than that there was less safety than otherwise there would have been; but it is notorious that the exigencies of traffic must sometimes require trains of such length as to go beyond the limits of an ordinary station-platform. Again, the defendants might have been requested to back the train, but there is no evidence that any such request was made or intended to be made." I find no affirmative evidence of any failure on the part of the defendants, and there was an absence of any evidence to shew that the platform was improperly constructed; no skilled witnesses were called to shew that it was so, or that passengers might mistake this place for one where they might alight, and I do not think even the plaintiff says that she was deceived by its appearance. I think, therefore, there is no evidence of the improper construction of the platform, or of the train being so drawn up as to induce the plaintiff to alight at a dangerous place; indeed there was an absence of the usual indications of arrival.

But, moreover, I think the rule should be made absolute on another ground: it seems to me that the damage did not flow from the defendants' negligence, if there was any. If there is negligence and anything in the nature of a hidden danger, that may give a cause of action, but not if there is contributory negligence; nor for damages for personal injury, unless it flows from the negligence. It seems to me that the plaintiff did contribute to this accident, and, in fact, that the injury was occasioned by her own act. The company gave her no invitation to alight, and the plaintiff, in the

(1) Law Rep. 4 Ex. 117.

absence of all the usual indications that she might do so, chose to alight at a place which was dark, and which was not used and could not be used for passengers. She seems to have got out at once, before there was time for any one to come up, and without calling out so that any one might come to her assistance. It seems to me, therefore, that the injury came from her own imprudent act, and this does not rest on any disputed facts, but simply on her own evidence. These cases must depend upon their own facts, but clearly it is for the judge to see that there is affirmative evidence laid before the jury on the part of the party on whom the onus of proof lies: *Ryder* v. *Wombwell.* (1) No doubt different views may be taken as to the amount of evidence, that should be left to them; but each judge must act on his own opinion subject to the correction of the Court, for whom in the present case the point has been reserved. For the above reasons, I think there was here not enough affirmative evidence of negligence on the part of the defendants to be left to the jury; and if there were, that this injury did not arise from such negligence. I do not say that if there had been an invitation by the defendants to the plaintiff to alight, they would not have been liable, but here, I think, there was no evidence of such an invitation.

KEATING, J. In this case the Lord Chief Justice having left the case to the jury, reserved leave to the defendants to move to enter a nonsuit on the ground that there was no evidence which he ought to have left to the jury. Now, there can be no doubt that a series of decisions have decided that the question whether there is evidence upon which the jury can properly and reasonably find a verdict for the plaintiff, is for the judge under the supervision of the Court, and the moment that proposition is affirmed it introduces an almost necessary conflict of opinion upon the facts, because the question whether there is evidence of the plaintiff's case must oblige the Court to weigh the facts. Had this been res integra, I should be strongly of opinion that there was evidence to go to the jury, but I think the question is concluded by authority, and that upon that ground this rule should be made absolute. Although the authorities differ in some respects, I think they do not in substance.

(1) Law Rep. 4 Ex. 39.

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In a large class of cases the question has been, whether there was anything in the nature of an invitation to the plaintiff to alight. And I think, as far as one can extract any rule from them, it is that if there be no invitation to the passenger to alight, he does so at his own risk; this is, perhaps, not so absolutely under all circumstances, but it is a general rule. Was there, then, anything amounting to an invitation here? The train was drawn up, the plaintiff's carriage being at some distance from the platform, which was at that part imperfectly lighted; there was no calling out of the name of the station, no opening of doors, and an absence of any evidence, that I can see, beyond the mere fact of the stoppage of the train, of anything that would amount to an invitation to the plaintiff to alight. Now the stoppage of the train, even though accompanied by the calling out of the name of the station, has been held not sufficient to amount to an invitation. No doubt, as has been put by my Lord Chief Justice, in this case there was an imperfect lighting of the platform, and the plaintiff might in consequence have thought that she was stepping on to it; but, it not having been shewn by evidence that the shape of the platform was improper, I do not think the shape of it, or the effect it might produce on the plaintiff's mind, would turn what was not an invitation into one. Then, has there been contributory negligence? If there was an absence of invitation, the cases shew that passengers alight at their own peril. Here the plaintiff opens the door herself and steps short of the platform, and thus the accident happens; ought she not to have kept her seat? The decisions tend to shew that she ought. Influenced by those decisions, I feel myself constrained, rather against my own opinion, to hold that there was not evidence upon which a jury could reasonably and properly have found a verdict for the plaintiff.

BOVILL, C.J. I much regret that the Court should be equally divided in opinion upon this case. I cannot find any case which directly decides the present question, and the differences of opinion on the Bench as to the inference to be drawn from the facts seem to me to shew that it ought to have been left to the decision of a jury. What might be sufficient evidence in one case might in another not be such as a jury should act upon. As an illustration, I will take the question, What is an invitation to alight? In some cases,

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the question has been raised as a question of law, whether the calling out of the name of the station amounts to an invitation to the passengers to alight; but it seems to me that it may or may not amount to such an invitation according to the time at which it takes place, the position of the train, and the nature of the station; if the name is called out while the train is in motion that clearly does not amount to an invitation to alight; if the train has been brought to a standstill and the porters pass from carriage to carriage, calling out the name of the station, that might be an invitation to the passenger to get out. I think it should be decided by a jury to which class each case belongs, taking into consideration all the facts connected with it. In the same way, I think there may be circumstances under which the mere stopping of the train may amount to an invitation to the passengers to alight, while there are other cases in which it would not; thus, if a train in the course of the journey stops, but not at a station, there is no such invitation; if, on the other hand, it stops at one of the large metropolitan stations, or at the terminus, then, I think, that the mere fact that it has been brought to the ordinary place for stopping, and has stayed there a reasonable time, might amount to such an invitation. Who is to determine whether it does so or not? It seems to me that this must be determined by the jury. So, if it be a station, which is not a terminus, it seems to me that, looking at the traffic and the nature of the station, the stoppage of the train there may or may not amount to an invitation; and of this again, I think the jury are the right persons to judge. In short, it seems to me to be impossible to say, as matter of law, that either the stopping of a train, or the calling out the name of the station, may not be an invitation to alight.

In this particular case there was no calling out of the name of the station, but there was a drawing up of the train at Deptford, which was a station at which the train usually stopped; it was a short distance from the last station on a metropolitan line where there was considerable traffic; the name of the station was not called out, probably, because the passengers would be well acquainted with it. The train, in point of fact, did not draw up at the proper place, and it appeared from the statement of the superintendent, that this arose from the fault of the engine-

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driver. The platform was long enough for the train, but at one end it retired so as to leave a space between it and a train opposite that part of it. It seems to me there was clear evidence of negligence on the part of the driver, from the form of the platform, the improper drawing up of the train, and the statement of the superintendent, and no one who heard the trial could doubt it. That, however, is not sufficient, unless it was negligence that caused the accident; now, on that point all that is necessary to consider is, whether there was evidence which I should have left to the jury at the trial. I thought there was, and it was agreed that the verdict should be entered for the plaintiff, with leave to the defendants to enter a nonsuit. Mr. White has argued as if the negligence depended on some one particular point; but it seems to me that we should look at all the facts together. It is not suggested that the platform was, in itself, improper, or the line of rail improper in relation to it; but the driver, bringing the train up to the station, as a servant of the company was aware of the construction of that station, and knew that if he brought the train up to the platform, which was of ample length, the passengers could alight in safety, and that if he brought it up short of the platform, passengers might be deceived into thinking they could get out at a place where they could not really do so safely. It was late at night, and on the train arriving at the station, the engine-driver could see that one part of the station was well lighted and another part insufficiently lighted; he also knew that there was a faint light in the carriage in which the plaintiff was, and the accident, I consider, arose from the circumstance that the train was drawn up at a place which, with reference to the platform and the light, was such that the plaintiff could see the platform and not the chasm between it and the train, and was induced therefore to believe she had been brought to the platform and might alight; and if there was evidence of that, there was evidence from which the jury might reasonably infer that it was negligence from which the injury arose. Again, there was evidence that the train was brought up to the part of the platform I have described, and stopped there, and the train did not afterwards draw up further; there was no evidence that it was a preliminary stoppage, but strong evidence that it was a final

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stoppage at that station, and if there was an invitation to descend, it was to do so in a place of great danger, which the company knew to be one of great danger; but of the nature of which the plaintiff was entirely ignorant. I think, there was evidence for the jury not only of negligence on the part of the defendants, but also of an invitation to the plaintiff to descend at a place which was dangerous, and which therefore caused the accident. If that be so, there is still another question, viz., whether the evidence with respect to the contributory negligence on the part of the plaintiff was so clear that the jury were bound to find that the plaintiff, by ordinary care, could have avoided the accident. That seems to me much mixed up with the other questions; because, if the train was brought up to the platform and an invitation was given to the plaintiff to alight, she was at liberty to assume, and it is clear she did assume, that in stepping out of the carriage she would be stepping out on the platform, and not knowing the danger, there would, in my opinion, be no negligence on her part, or at all events, I think the jury would be justified in coming to that conclusion. In that respect this case differs from *Petty* v. *Great Western Ry. Co.* (1), in which the Court of Exchequer sent the case down to a new trial, that the jury might find whether the plaintiff did believe she was stepping on to the platform. Several cases have been relied upon on the part of the defendant upon both points, but after carefully considering them it seems to me that they are all distinguishable and that there is no case which is precisely like the present one, or which must necessarily govern our decision. In the case of *Plant* v. *Midland Ry. Co.* (2), the plaintiff knew that he was descending at a place which was not the platform, and he knew therefore the danger he was running; in the case of *Bridges* v. *North London Ry. Co.* (3), the train had stopped but not at a platform; the carriage was in the tunnel and in the dark, and there was nothing to lead the plaintiff to think he was descending on to the platform, and in that respect it differed from the present. In *Harrold* v. *Great Western Ry. Co.* (4), the plaintiff knew the train had overshot the platform, and in *Siner* v. *Great Western Ry. Co.* (5), the female plaintiff was

(1) Ante, p. 461, note.
(2) 21 L. T. (N. S.) 836.
(3) Ante, p. 459, n. (5).
(4) 14 L. T. (N. S.) 440.
(5) Law Rep. 4 Ex. 117.

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also aware that they were not at the platform, yet descended with the assistance of her husband, and, thinking there was little risk, took that risk upon herself. I think, therefore, that case is clearly distinguishable, and that there is no authority which lays down any principle which rendered it necessary to withdraw this case from the jury, and I am of opinion that this rule ought to be discharged.

The Court being equally divided, the rule drops.

Post 657 6 Ex 403.

F. M. White, for the defendants. There may be some doubt, if the rule drops, whether the defendants will be able to appeal. The more usual practice is for the junior judge to withdraw his judgment; the rule will then be made absolute, and the plaintiff will be able to appeal.

Gibbons, for the plaintiff, contended that it was unfair to the plaintiff that she should have the burden of the appeal cast upon her, and that it might affect her eventual right to costs.

BOVILL, C.J. We will consider what should be done; but the defendants are entitled to appeal.

On a subsequent day, *O'Malley, Q.C.*, who appeared for the defendants, suggested that the company would dispense with the bail and security required by the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, s. 38.

BOVILL, C.J. In a case of *Levy* v. *Green* (1), which is referred to in Mr. Day's Common Law Procedure Act, 3rd ed. 240, the Court of Queen's Bench, under precisely similar circumstances, held that the rule might be considered as discharged within the meaning of the Act, treating the defendant as the proper person to appeal. Following that precedent, the rule in this case will be considered as discharged.

KEATING, MONTAGUE SMITH, and BRETT, JJ., concurred.

Rule discharged. (2)

Attorney for plaintiff: *W. H. Smith.*

Attorney for defendants: *E. P. Cearns.*

(1) 4 Jur. (N. S.) 86; 30 L. T. 241; 6 W. R. 209.

(2) And see *Burnett* v. *Allen*, 4 Jur. (N. S.) 488; *Hickman* v. *Cox*, 3 C. B. (N. S.) 523.

[IN THE EXCHEQUER CHAMBER.]

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May 17.

BRADLAUGH *v.* DE RIN.

Bill of Exchange—Code de Commerce, arts. 137, 138—*Effect of Indorsement in Blank.*

Art. 137 of the Code de Commerce requires that the indorsement of a bill or note shall be dated, express the value received, and the name of the indorsee; and art. 138 provides that if the indorsement does not comply with these requisitions, it shall not operate as a transfer o the bill, but only as a procuration.

A bill was drawn by A., in Brussels, on the defendant, in London, and accepted by the defendant in London. It was afterwards indorsed by A. in Brussels, to C., and by C. in Paris to D., and by D. to E., who there indorsed it in blank to the plaintiff, who resided in London, for the purpose of his receiving the amount on E.'s account.

The Court of Common Pleas held that by the French law the indorsement to the plaintiff gave him no right to sue the acceptor in France, and therefore that the plaintiff could not sue upon it here:—

Held,—reversing the judgment of the Common Pleas,—that arts. 137, 138, did not prevent the plaintiff from suing the acceptor in France, and therefore that the plaintiff could sue the acceptor in England.

Trimbey v. *Vignier* (1 Bing. N. C. 151), discussed.

APPEAL against a decision of the Court of Common Pleas, making absolute a rule to enter a nonsuit. (1)

Action upon three bills of exchange for 120*l*., 80*l*., and 80*l*., respectively, drawn on the 28th and 29th of April, 1866, by Van den Bronck upon and accepted by the defendant, payable respectively one month after date to the order of the drawer, and indorsed by him to Emile Berle, by Berle to Edward Herzberg, by Herzberg to Gellet, and by Gellet to the plaintiff.

The only material pleas were traverses of the several indorsements.

The cause was tried before Montague Smith, J., at the sittings in London after Michaelmas Term, 1867. The bills were drawn by Van den Bronck in Brussels, and sent for acceptance to the defendant, who resided in London, and were accepted there by the defendant, who returned them to Van den Bronck.

The indorsements by Van den Bronck were made at Brussels; those of Berle, Herzberg, and Gellet, in Paris. It was found that full value had been given for the bills by Berle. [The bills were

(1) Law Rep. 3 C. P. 538.

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indorsed to the plaintiff that he might receive the proceeds on Gellet's account.]

It was objected, on the part of the defendant, that indorsements in France were invalid unless they complied with certain formalities required by the Code de Commerce; and he called as a witness a French jurisconsult who had practised law in Paris, and who, on inspecting the bills, stated that the indorsements upon the bills were in the correct form according to the law of France, with the exception of the last indorsement on each bill, which was in blank, and invalid according to the law of France; that, being invalid, such last-mentioned indorsement only operated as a procuration, and left the title in the bills to the party so indorsing. Articles 137, 138, of the Code de Commerce were also cited by the defendant's counsel; and it was agreed that the whole of the Code should be considered as in evidence.

The learned judge directed a verdict to be entered for the plaintiff for 30*l.* 12*s.*, the defendant having leave to move to enter a verdict for him on the ground that the indorsements should have been made according to the French law, and that on each of the bills the last indorsement was not so made.

A rule nisi was accordingly obtained in Hilary Term, 1868, which was made absolute at the sittings in banc after Trinity Term, 1868.

Lumley Smith, for the plaintiff. The plaintiff is entitled to recover even if the indorsement gives no right to sue by the French law: *Lebel* v. *Tucker*. (1) And, assuming the bills in question to be foreign bills, and that they require an indorsement valid by French law, there is nothing in the Code de Commerce to disentitle the plaintiff to maintain an action against the acceptor.

C. W. Wood, for the defendant. By articles 137 and 138 of the Code (2), the plaintiff would be unable to sue on the bills in France. In *Trimbey* v. *Vignier* (3) it was held that a plaintiff claiming under an indorsement in blank made in France, as in this case, could not sue on the bill in England.

(1) Law Rep. 3 Q. B. 77.

(2) Art. 137: "L'endossement est daté. Il exprime la valeur fournie. Il énonce le nom de celui à l'ordre de qui il est passé." Article 138: "Si l'endossement n'est pas conformé aux dispositions de l'article précédent, il n'opère pas le transport, il n'est qu'une procuration."

(3) 1 Bing. N. C. 151.

[COCKBURN, C.J. The meaning of articles 137 and 138 is explained in Paillet, Manual de Droit Français, vol. ii. p. 1140, ed. notes 3—6. The indorsement in blank, it seems, does not pass the property in the bill, but is only a procuration; that is, the indorsee takes it subject to all the equities, as in the case of an overdue bill with us.]

[BLACKBURN, J. In *Trimbey* v. *Vignier* (1), the Court of Common Pleas seem to have misunderstood the opinions of the advocates.

COCKBURN, C.J., referred to Bédarride, Lettre de Change, vol. i. p. 430, ss. 321, 322.]

Lumley Smith was not called upon to reply.

COCKBURN, C.J. What is the law of a foreign country is a question of fact, and not of law. This has long been recognized and acted upon. In the present case, however, by agreement of the parties, the Code de Commerce is considered as in evidence, and, in order to put a proper construction upon its provisions, we may properly, I think, have recourse to such assistance as the French jurists may afford us. With the greatest respect for the high authority of the very learned judges who presided on the occasion, I must say that the decision of the Court in *Trimbey* v. *Vignier* (1) surprises me. The opinions given by the two French advocates in that case seem to me to be perfectly reconcileable with each other. One of them, that of M. Blanchet, is positive that the 138th article of the Code de Commerce is only available on behalf of the party making the indorsement in blank against the immediate holder under such indorsement. And that is not negatived by the opinion of M. Vervourt. I therefore do not feel myself bound by that case. The question then is, what is meant by a "procuration" in article 138. I find it laid down by two French jurists of great distinction, viz. Paillet and Bédarride, in the passages referred to in the course of the argument, that an irregular indorsement, that is, one which does not comply with the formalities prescribed by article 137 of the Code de Commerce, does not pass the property in the bill or note absolutely, but only to this extent, that it is open to all the exceptions which

(1) 1 Bing. N. C. 151.

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would be available against the indorser himself. Subject to that, the person who takes by virtue of an indorsement in blank is entitled by the law of France to sue upon the bill or note in his own name. That seems to me to be the good sense of the thing. It prevents the possibility of any fraud or malpractice. We do not find in the ordinary transactions of the commercial world any inconvenience resulting from indorsements in blank, which are the ordinary indorsements in use amongst us. It is conceded that if the action had been brought by or in the name of Gellet, there would have been no defence. And I am clearly of opinion that the objection cannot be taken by the acceptor, and that the French law is not that which it was assumed to be in *Trimbey* v. *Vignier*. (1) I think the judgment of the Court of Common Pleas should be reversed.

KELLY, C.B. I also think the judgment of the Court below was wrong. We must not, however, be understood as holding that the law of a foreign country is not to be proved as a matter of fact. In the present case, though we have the opinions of French advocates, it is agreed between the parties that the whole of the Code de Commerce is to be considered as before us. We are at liberty, therefore, to examine the Code for ourselves, and put the best construction we can upon it. Passing by article 137, the 138th article is in these terms: "Si l'endossement n'est pas conformé aux dispositions de l'article précédent, il n'opère pas le transport, il n'est qu'une procuration." The blank indorsement does not operate as a complete transfer of the bill, but only as a procuration. What is the effect and meaning of a procuration, as contradistinguished from a complete transfer of the property in the bill? It would, I think, be an extremely rash thing to put a construction upon that expression without consulting the commentaries made upon the Code by French jurists and the judgments of the Courts of France. In addition to the authorities cited by the Lord Chief Justice, I would refer to Nouguier, Lettres de Change, ed. 1851, vol. i., p. 418, and Bravard-Veyrieres, par Demangeat, vol. iii., lib. 1, tit. viii., § 2, pp. 176, 177, ed. 1862. From the language of those commentaries and those judgments, I

(1) 1 Bing. N.C. 151.

think it must be inferred that it is competent to the indorsee under a blank indorsement to sue upon the bill or note in his own name, provided it is for the benefit of the immediate indorser. I think the plaintiff is entitled to judgment.

CHANNELL, B. Upon the materials before us, I also think the plaintiff is entitled to judgment. It appears that by the French law the indorsement of these bills by Gellet to the plaintiff is not sufficient to operate as a transfer of the bills, but amounts only to a procuration. But the defendant has failed to satisfy me that the law of France disentitles the plaintiff to sue him. The French advocate who was examined at the trial was not asked whether the effect of article 138 of the Code de Commerce was to prevent an action being maintained by the plaintiff in his own name, or whether the form of indorsement merely entitled the party sued to set up certain defences.

BLACKBURN, J. I agree with my Brother Channell that it lay upon the defendant to prove that the French law disentitles the plaintiff to sue upon these bills in his own name, and that he has failed to do so. It seems to have been taken for granted by the Court of Common Pleas in *Trimbey* v. *Vignier* (1) that a blank indorsement gives no title to sue on the bill. The opinion of one of the French advocates in that case was exactly the contrary, and that of the other was not necessarily inconsistent with it. In deciding as they did, the Court seem to me to have fallen into a mistake of fact. The judgment below assumes that case to have been correctly decided. I rest my judgment on this, that there was no evidence to shew that by the law of France there is any impediment to the plaintiff's right to sue upon these bills. I think the judgment of the Court below must be reversed, and that the plaintiff is entitled to a verdict.

MELLOR and LUSH, JJ., and CLEASBY, B., concurred.

Judgment reversed.

Attorneys for plaintiff: *Heath & Parker.*
Attorneys for defendant: *Lewis & Watson.*

(1) 1 Bing. N. C. 151.

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May 17.

[IN THE EXCHEQUER CHAMBER.]

HEILBUT AND ROCCA, ASSIGNEES OF GEORGE SPILL, A BANKRUPT, AND BRIGGS *v.* NEVILL.

Partnership—Fraudulent Dealing with Partnership Property—Bankrupt—Disaffirmance by Assignees—Joinder of Parties.

B. & S. traded in partnership, and were possessed of bills of exchange, which S., in fraud of the partnership, indorsed and delivered to the defendant in satisfaction of a private debt of his own, the defendant being cognizant of the fraud. S. became bankrupt. The defendant having realized the bills, the assignees of S., jointly with B., without having previously done anything to disaffirm the transaction, brought an action against the defendant for the wrongful conversion, and for money received to their use :—

Held,—affirming the judgment of the Common Pleas,—without deciding whether the plaintiffs could maintain an action for conversion, that they were entitled to recover under the counts for money received to their use.

APPEAL against a decision of the Court of Common Pleas, making absolute a rule to enter a verdict for the plaintiffs. (1)

1. Two of the plaintiffs, viz. Heilbut and Rocca, are the creditors' assignees of one George Spill, a bankrupt, who previously to his bankruptcy was in partnership with the third plaintiff, Briggs, as manufacturers of waterproof fabrics. The first count of the declaration was for the conversion of bills of exchange alleged to be the property of Spill & Briggs. The second count was similar, laying the property as belonging to the assignees of Spill and Briggs. There were also counts for money received to the use of Spill and Briggs, and also to the use of the assignees and Briggs. The defendant pleaded, to the first and second counts, not guilty, and not possessed; and, to the money counts, never indebted.

2. On the 13th of March, 1867, Spill was arrested and lodged in Whitecross Street prison under an execution upon a judgment against Spill and Briggs; and detainers were subsequently lodged against him, with the sheriffs, by other creditors of the firm of Spill & Briggs, upon judgments obtained against them. Spill was detained in custody under these executions until the 18th of April, 1867, on which day he was adjudicated bankrupt by a registrar of

(1) Law Rep. 4 C. P. 354.

the Court of Bankruptcy, on one of his periodical visits to the prison, pursuant to the provisions of the Bankruptcy Act, 1861.

3. The defendant between the month of April, 1865, and the 13th of December, 1866, from time to time advanced moneys to Spill in his private capacity, and paid moneys on his account, amounting to 312*l.* 11*s.* 6*d.*

4. In September, 1866, a general meeting of the creditors of Spill & Briggs was called, and a resolution passed that the estate should be wound up under the inspection of four of the principal creditors; and a deed of inspection was prepared and executed by a statutory majority of the creditors of the firm and by the plaintiff Briggs. Subsequently, on the 13th of December, 1866, Spill went to the counting-house of the firm, and, made a list of the bills there, and took away, among others, ten bills of exchange belonging to the partnership, of the value in all of 314*l.* 5*s.* 4*d.*, which had been accepted by customers of the firm, and were drawn or indorsed by the firm.

5. On the same 13th of December, Spill took to the defendant the bills mentioned in the last paragraph, and indorsed such of them as required indorsement in the partnership name, and handed the whole of them to the defendant in payment of the debt from Spill to the defendant, who thereupon paid to Spill the difference between the amount of the bills and the amount of the alleged debt, viz. 1*l.* 13*s.* 10*d.* The bills were so handed over by Spill in fraud of the firm of Spill & Briggs. The defendant had notice that they were handed over in fraud of the firm; and it was admitted that the handing over of the bills to the defendant was a fraudulent preference.

6. The pleadings in the action were to form part of the case.

7. The cause was tried at the sittings in London after Michaelmas Term, 1868, before Montague Smith, J., who directed a nonsuit, but reserved leave to the plaintiff to move to enter a verdict for the sum claimed,—the fraudulent preference being admitted, and the Court having power to draw inferences of fact. A rule nisi was obtained in Hilary Term, 1869, which was made absolute in the following Easter Term.

Prentice, Q.C. (*Barnard* with him), for the defendant. The

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delivery of the bills by Spill to the defendant was a transaction which was voidable as against Spill's assignees; but, before they could take advantage of that, the assignees must elect to disaffirm the transaction, according to *Stevenson* v. *Newnham.* (1) To entitle them to maintain an action for the conversion, there must be a demand and refusal: *Nixon* v. *Jenkins.* (2) And the election must be made before action brought: *Marks* v. *Feldman.* (3) As against Spill, the defendant's property in the bills was unquestionable; and Spill's assignees can be in no better position than Spill himself. Briggs clearly could not have maintained this action alone; and, if he joined Spill in the action, no bankruptcy intervening, Spill being estopped from setting up his own fraud, both would be estopped: *Jones* v. *Yates* (4); *Wallace* v. *Kelsall* (5); *Phillips* v. *Claggett.* (6) This difficulty is not removed by the assignees of Spill, instead of Spill himself, being parties to the action.

Butt, Q.C. (*Archibald* with him), for the plaintiffs, was not called upon.

COCKBURN, C.J. I am of opinion that the judgment of the Court of Common Pleas should be affirmed. The action is brought by the assignees of Spill, a bankrupt, and Spill's partner. The declaration contains counts in trover and for money had and received. My judgment is based entirely on the claim in the counts for money had and received. So far as the counts for conversion are concerned, the case is open to considerable difficulty. The case of *Nixon* v. *Jenkins* (2) establishes that where assignees of a bankrupt intend to disaffirm an act of the bankrupt on the ground of fraudulent preference, they must do some act, as, by making a demand of the goods, for instance, so as to divest the property in the goods, before they can maintain an action for their recovery. That seems to be a sound principle, though a somewhat technical one. The act of the bankrupt being only voidable at the option of the assignees, until they have done something to intimate their intention to avoid the transaction, it remains valid. But that purely

(1) 13 C. B. 285.
(2) 2 H. Bl. 135.
(3) Law Rep. 5 Q. B. 275.
(4) 9 B. & C. 532.
(5) 7 M. & W. 264.
(6) 10 M. & W. 102.

technical objection does not apply where the action is brought for money had and received. The goods having been converted into money, the defendant cannot restore them, and therefore there is no necessity for a disaffirmance of the transaction by a notice or demand. When they do avoid the transaction, the money is money had and received to their use. There is no necessity for importing the technical difficulty into this form of action. Upon the statement of facts before us, I think we are justified in assuming that the bills in question have been realized and are now in the hands of the defendant in the shape of money. Then comes the question how far the action can be jointly brought by Spill's assignees and Briggs. It is unnecessary for us to consider what may be the rights of Briggs and Spill's assignees as between themselves. The two partners might have brought the action, if there had been no bankruptcy, provided Spill was not estopped from setting up his own fraud. No such estoppel, however, can prevail against the assignees; and therefore I see no reason why the action should not be brought by them jointly with Briggs, as against whom the acts of Spill never were valid.

KELLY, C.B. I entirely agree that the judgment of the Court below must be affirmed. There may be several grounds upon which this action is maintainable. I, however, think it enough to rest my judgment on one, which I take to be conclusive of the question. It appears that Briggs and Spill were traders in partnership, and were possessed of certain bills of exchange, and that Spill, without the authority of Briggs, and in fraud of the partnership, took the bills and indorsed and delivered them to the defendant in satisfaction of a private debt of his own; and it further appears that the defendant, when he received the bills from Spill, knew that they were the property of the firm, and that Spill delivered them to him without authority and in fraud of the partnership. The first question which rises upon this state of facts is, whether any property in the bills,—the entirety or the share of Spill,—passed under the circumstances. I am clearly of opinion that no property in the bills, or in Spill's separate interest in them, passed by the delivery to the defendant. Spill was not the owner of the bills; he only had an interest in them as one of

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the firm. That interest he could not pass away by indorsement. There is no such form of indorsement known to the law. By the indorsement, therefore, of such of the bills as required indorsement, even Spill's interest in the bills did not pass to the defendant; and, as to those which were delivered over without indorsement, I need hardly say that the defendant could acquire no property by the mere delivery. Spill might, indeed, have passed his interest in the bills in equity, but not at law. As to any legal effect, therefore, the indorsement of some of the bills and the delivery of the rest were absolutely null and void. Then comes the question whether the action is rightly brought in the names of the assignees and Briggs jointly. Spill having become bankrupt, his assignees find that the defendant is in possession of money the proceeds of bills of exchange belonging to the firm,—for, I agree that we may assume that the defendant has received the amount of the bills,—and they jointly with Briggs bring an action for money had and received. As the defendant took no property in the bills, the proceeds of the bills received by him were the moneys of the co-partnership. Under these circumstances, I think there was no defence to the action for money had and received. In the view we take, it becomes unnecessary to consider the effect of the fraudulent preference. It might or might not raise some difficulty. My judgment is based on the ground that no property or interest in the bills passed to the defendant by the indorsement and delivery of them to him by Spill.

CHANNELL, B. I am of the same opinion. Whatever difficulty might have presented itself as to the plaintiff's right to maintain the action upon the counts for conversion, I think none exists as to the counts for money had and received. I agree with the Lord Chief Baron that no title or property in the bills ever vested in the defendant; and, though a difficulty in the way of procedure might have arisen if the action had been brought by the firm, that difficulty is removed by the events which have happened. I cannot entertain a doubt that, when the proceeds of the bills were received by the defendant, they became the moneys of the assignees and Briggs.

BLACKBURN, J. I also am of opinion that the judgment of the

Court of Common Pleas should be affirmed. I am not quite satisfied as to whether or not any property in the bills passed to the defendant by the indorsement and delivery. But, if any did pass, I think the transaction between Spill and the defendant was voidable, and the plaintiffs may maintain this action. I agree that, where a transaction of this sort is voidable, and an innocent party has acquired an interest in the property, the election on the part of the assignees to disaffirm it comes too late: *Young* v. *Billiter*. (1) If, therefore, this was simply an action for the conversion of the bills, I should have felt a difficulty in holding that it could be maintained without a previous disaffirmance of the transaction by the assignees. But, with regard to the counts for money had and received, no such difficulty arises. If there was nothing to prevent the assignees from disaffirming the transaction as against the defendant, I see no reason why they might not at once do so, and sue for the proceeds of the bills as money received to their use; the mere issuing of the writ being a sufficient disaffirmance for that purpose. So long as Spill was sui juris, there would no doubt be a difficulty. He could not disaffirm his own contract; and, as Briggs could not sue without joining him, there would be a technical obstacle in the way. If Spill's assignees had no more right than Spill himself had, they would be equally estopped: *Jones* v. *Yates*. (2) As far as Briggs' interest in the bills was concerned, he clearly might disaffirm the transaction, so as to Spill's interest the assignees might. I, therefore, see no objection to their joining in an action for money had and received, though there is that technical difficulty in the way of their maintaining an action for the wrongful conversion.

MELLOR, J. I am of the same opinion. I think the same result must follow in this case whether the delivery of the bills by Spill to the defendant was a void transaction or voidable only. The technical difficulty of an action by Briggs and Spill jointly is, I agree, for the reasons already given, removed by Spill's bankruptcy.

LUSH, J I also agree that the judgment of the Court below

(1) 8 H. L. 682. (2) 9 B. & C. 532.

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should be affirmed, for the reasons given by the Lord Chief Justice and the Lord Chief Baron.

CLEASBY, B. The authority of one partner to deal with the property of the firm depends upon agency. The text-books lay it down that one member of a firm has no power to pledge the goods of the partnership in respect of his private debt, and that any attempt to do so would not have the effect of passing the property in the goods. That being so, the indorsement and delivery of the bills in question by Spill to the defendant had not the effect of vesting any property therein in the defendant. If the assignees had been suing as representing Spill, the same objection might have been urged as if Spill himself had been a party to the action. But, the transaction being confessedly fraudulent, the assignees are not suing as representing the bankrupt, but, as in all cases of fraudulent preference, they sue as assignees of the estate under the bankrupt laws, and the law enables them to defeat a transaction entered into for the purpose of evading those laws.

Judgment affirmed.

Attorneys for plaintiff: *Venning, Robins, & Venning.*
Attorney for defendant: *Godwin.*

END OF EASTER TERM, 1870.

CASES

DETERMINED BY THE

COURT OF COMMON PLEAS,

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF COMMON PLEAS,

IN AND AFTER

TRINITY TERM, XXXIII VICTORIA.

MORGAN, APPELLANT; HEDGER, RESPONDENT. 1870 June 7.

Public House—Innkeeper opening his House on Sunday—Travellers—Burthen of Proof—11 & 12 *Vict. c.* 49, *s.* 1—*Wine and Beer House Act*, 1869 (32 & 33 *Vict. c.* 27), *s.* 15.

Upon an information against an innkeeper, under 11 & 12 Vict. c. 49, s. 1, for opening his house for the sale of beer during the prohibited hours on Sunday, the burthen of proof that the innkeeper knew that the persons supplied with beer were not travellers, lies upon the informer; and this question is not affected by the Wine and Beer House Act, 1869.

Davis v. *Scrace* (Law Rep. 4 C. P. 172) followed.

CASE stated by Justices under 20 & 21 Vict. c. 43.

At a petty sessions holden at Abingdon, an information was preferred by P. Hedger, the superintendent of Berks county constabulary, the respondent, against T. Morgan, the appellant, under 11 & 12 Vict. c. 49, s. 1, or 18 & 19 Vict. c. 118, as amended by 32 & 33 Vict. c. 27, ss. 13, 15, 16, charging that the appellant, being the occupier of premises known as The Farriers' Arms, and being licensed to sell beer by retail to be drunk on the said

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premises, did open his house on Sunday, the 22nd of August, for the sale of beer, before the hour of half-past 12, or before the termination of the morning Divine service, between the hours of 10.30 A.M. and 12 A.M., the same not being for refreshment to any traveller or lodger.

The justices convicted the appellant, and fined him 10*s.*, and 1*l.* 1*s.* 6*d.* for costs.

It was proved that there were several men drinking beer between the hours of 10.30 and 12 A.M. on the Sunday in question at the Farriers' Arms; but the names of some of the men were unknown or not proved.

The appellant contended that, under *Davis* v. *Scrace* (1), the burthen of proof that the men in question were not bonâ fide travellers rested upon the respondent.

The respondent relied on the Wine and Beer House Act (32 & 33 Vict. c. 27), and contended that it threw the onus probandi on the party charged.

The justices decided that there was a primâ facie case of the sale of beer made out against the appellant, which he had to meet.

The appellant thereupon called as witnesses some of the men who were present at the Farriers' Arms about 12, who swore they partook only of ginger-beer, or gave evidence as to being bonâ fide travellers, and who the witness for the informer admitted to have been there. The appellant, however, gave no evidence at all as to some of the men sworn to have been seen by the informer's witness. The justices thereupon held that the appellant had failed to clear himself of the charge.

The question of law was, whether the fact of men whose names were unknown to the informer's witness drinking beer at or about 11 o'clock on the Sunday morning at the Farriers' Arms, was sufficient evidence whereon to convict the appellant, or was the case of *Davis* v. *Scrace* (1) yet binding notwithstanding the Wine and Beer House Act, 1869, and was the respondent, therefore, still bound to prove affirmatively that the persons in question were not travellers.

T. S. Pritchard, for the appellant. In *Davis* v. *Scrace* (1), the

(1) Law Rep. 4 C. P. 172.

Court, following the decision in *Taylor* v. *Humphries* (1), held that, notwithstanding s. 14 of 11 & 12 Vict. c. 43 (Jervis's Act), the complainant was bound to prove affirmatively that the persons supplied by the defendant with refreshment were not travellers. The only question here is, whether the recent statute of 32 & 33 Vict. c. 27, has altered the law in this respect. (2) The innkeeper being bound to furnish refreshment to travellers, it would be unreasonable to cast upon him the burthen of proving that every one he supplies is a bonâ fide traveller. There is nothing in the recent Act to alter the law; and 11 & 12 Vict. c. 43, is not repealed either actually or constructively.

Harington, contrà. It is plain that the justices intended to convict the appellant under s. 15 of 32 & 33 Vict. c. 27. There being no provision in that Act incorporating those of the former Acts, they must be deemed to be repealed. Assuming that not to be so, the appellant was clearly guilty of an offence under 11 & 12 Vict. c. 49, s. 1.

KEATING, J. The question put to us by the justices is, whether the statute 32 & 33 Vict. c. 27 gets rid of the effect of the decision of this Court in *Davis* v. *Scrace* (3), so as to throw upon the respondent the burthen of proving that the persons supplied by him with refreshment within the prohibited hours on Sunday were bonâ fide travellers. It seems to me that the recent statute cannot touch the question in any way, unless it has the effect of repealing the former Act altogether. And it is impossible that it can have that effect; for, it does not refer to the former Act, and there is nothing

(1) 17 C. B. (N. S.) 539; 34 L. J. (M.C.) 1.

(2) 32 & 33 Vict. c. 27, s. 15, enacts that, "if any person suffer beer or cider to be drunk in his house at any time during which the house ought by law to be closed, he shall be liable, on summary conviction, to a penalty not exceeding 40s. for each offence."

Sect. 16, that, "where any person licensed under any of the recited Acts to sell beer, cider, or wine by retail, or any person licensed under 9 Geo. 4, c. 61, is convicted of keeping his house open for the sale of or of selling beer, cider, wine, spirits, or any other exciseable liquor, or of suffering the same to be drunk in such house, at any time during which such house ought by law to be closed, any person (other than the servants or inmates of such house) present in such house at such time shall, unless he account for his presence to the satisfaction of the justices having cognizance of the case, be liable on summary conviction to a penalty not exceeding 40s. for each offence."

(3) Law Rep. 4 C. P. 172.

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in its provisions which is at all inconsistent with the former Act, so as to repeal it by implication. *Davis* v. *Scrace* (1), therefore, still remains a binding authority on the subject.

MONTAGUE SMITH, J. I am of the same opinion. The information does not charge the appellant in the words of 32 & 33 Vict. c. 27, s. 15, with suffering beer or cider to be drunk in his house at a time during which the house ought to have been closed; but that, being a person licensed to sell beer by retail to be drunk on the premises, he opened his house during the prohibited hours on Sunday for the sale of beer, the same not being for refreshment to any traveller or to any lodger in the said house in the words of 11 & 12 Vict. c. 49, s. 1, and 18 & 19 Vict. c. 118. The conviction was, therefore, under 11 & 12 Vict. c. 49, s. 1, and 18 & 19 Vict. c. 118. It seems to me that there was not any evidence to sustain that conviction. The magistrates admit that, if the onus of proving that the persons found in the house were not travellers lay upon the informer, he had not proved it. But they thought that 32 & 33 Vict. c. 27, s. 15, cast the burthen of proving the affirmative on the defendant. It seems to me, however, that that statute in no degree alters the onus of proof or the nature of the evidence necessary to justify a conviction.

BRETT, J. It is not necessary to determine what s. 15 of 32 & 33 Vict. c. 27 does; it is enough to say what it does not. It clearly does not repeal either 11 & 12 Vict. c. 49, or 18 & 19 Vict. c. 118; neither does it alter the burthen of proof under those statutes.

Conviction quashed. (2)

Attorney for appellant: *Mallam, for Mallam, Oxford.*
Attorney for respondent: *Challends, Abingdon.*

(1) Law Rep. 4 C. P. 172. (2) See next case.

COPLEY, APPELLANT; BURTON, RESPONDENT.

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June 28.

Innkeeper opening his House on Sunday—Travellers—Burthen of Proof—11 & 12 Vict. c. 49, s. 1—Costs of Appeal.

Upon an information against an innkeeper, under 11 & 12 Vict. c. 49, s. 1, for opening his house for the sale of wine and beer during the prohibited hours on Sunday, the burthen of proof that the innkeeper knew that the persons supplied with beer or wine were not travellers, lies upon the informer.

Eight persons went to a refreshment-room at a railway station (which room was attached to and formed part of the defendant's hotel) on Sunday morning at 11.10, six of whom had a glass of beer and the other two a glass of sherry each, standing at the counter. Four of the men were residents in the town within half a mile of the station; the other four were strangers. A train was due at 11.13. The strangers and three of the residents went by the train, and the fourth (who had been to see his son off) returned home. Two of the three residents who went by the train were seen walking in the town between 2 and 3 in the afternoon of the same day. There was a printed notice hung up in a conspicuous part of the refreshment-room intimating that refreshments were supplied during the time of Divine service on Sundays only to travellers, and that those who improperly obtained them would subject themselves to penalties: and it was proved that the defendant had given directions to his servants to inquire, before supplying any refreshment, whether or not the person asking for it was a traveller.

The magistrates found that the four residents were not "travellers," but did not in terms find that the defendant knew it; and they convicted him in a penalty:—

The Court quashed the conviction, on the ground that the onus of proving knowledge in the defendant rested on the informer; and intimated that, inasmuch as this rule had been so repeatedly laid down by the Court, they would in future, when a conviction was quashed for want of such proof, consider it right to impose costs.

CASE stated by Justices under 20 & 21 Vict. c. 43.

1. At a petty-sessions held at Todmorden, in the west-riding of Yorkshire, on the 9th of September, 1869, an information preferred by William Burton, a serjeant of police (hereinafter called the respondent), against John Copley, a licensed victualler (hereinafter called the appellant), under 11 & 12 Vict. c. 49, s. 1, charging that the appellant, on the 22nd of August then last, at Todmorden, then being a licensed victualler, and the said day being Sunday, unlawfully did open his house for the sale of wine and beer before half-past 12 o'clock in the afternoon, to wit, at ten minutes past 11 o'clock in the forenoon, otherwise than as refreshment for travellers, was heard and determined by three justices; and the appellant was convicted in the penalty of 1*s.* and 14*s.* costs.

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2. Upon the hearing of the information it was proved, and found by the justices, that the appellant's house, which is called the Queen's Hotel, is situate in Todmorden, near to the railway-station there, and has a communication with such station by means of a covered gangway, in the sides of which are windows and which leads into a room called "The Refreshment Room."

3. The respondent, accompanied by a police-constable, visited this refreshment-room about 10 minutes past 11 A.M., and found therein eight men, six of the men having each a glass of beer part drunk, and the other two men having a glass of sherry each. They were all standing; and some were smoking. Four of these men the officers knew to be residents in the town; and the other four men were strangers to the town. A female waiter usually attends to that room, the appellant taking a general superintendence. He was then in another part of the house, but had been in the refreshment-room shortly before the respondent and the constable entered the room; and, on two of the four residents coming into the room, the appellant, before they were served with any refreshment, inquired if they were going by the train, to which they replied in the affirmative. The officers asked the waiter for the landlord. Whilst the officers were there waiting, the eight men each drank up his ale or wine, and went on to the station. There was a train due at 11.13. The officers did not speak to any of the eight men, nor they to the officers. Two of the four residents resided within a quarter of a mile of the hotel, and the other two within half a mile. The appellant has kept this hotel several years. After a short interview between the officers and the landlord, in the course of which the landlord pointed out to the officers a printed notice, hung in a conspicuous part of the room, the officers told him the names of the four residents. The officers returned by the gangway to the station, and saw one of the four residents go from the platform into the ticket-office and then return and cross over the rails on to the platform for Yorkshire. He and two other of the four residents and the strangers all went by the train. It was several minutes after the train was due and ought to have started for Yorkshire when this resident went into and returned from the ticket-office; but a railway official always rings a bell when a train is about a mile distant. The train stops at a station distant a little

above two miles from Todmorden, and afterwards about every two or three miles to Wakefield, Leeds, or Bradford.

4. When the train departed, one of the four residents left the station and returned towards his home in Todmorden, he having come to see a son off by the train, who resided at a distance, and had been on a visit to his father; and two others of the four were seen by the officers walking in the town of Todmorden between 2 and 3 o'clock in the afternoon of the same day.

5. The officers then returned to the hotel and told the appellant they had seen one of the four men (whose name they mentioned) leave the station and return into the town, and the other three go off by train. The officers had seen some of the four in the town shortly previous to seeing them walk along the gangway into the hotel. When the officers told the names of the four men whom they knew, they asked the appellant if he considered them travellers. His reply was, that, if they either came or went by train, he considered them travellers; and he asked the waiter if he had not given her directions not to give out refreshments on Sunday during the prohibited hours without first asking the parties whether they had come or were going by train. She replied that he had given such directions to her, but she failed to ask the question of the two residents who came in after the appellant left the room. The outer doors to the other parts of the hotel were all closed. The following is a copy of the printed notice before referred to :—

"NOTICE TO THE PUBLIC.

"The following clause is in the new Wine and Beerhouse Licensing Bill, and subjects each person present in a licensed house at illegal hours to a penalty of 40*s*. 'Where any person licensed under any of the said recited Acts to sell beer, cider, or wine by retail, or any person licensed under the said Act of the 9th year of the reign of King George the Fourth (1) is convicted of keeping his house open for the sale of, or of selling, beer, cider, wine, spirits, or any other excisable liquor, or of suffering the same to be drunk in such house, at any time during which such house ought by law to be closed, any person (other than the servants or inmates of such house) present in such house at such time shall, unless he account for his presence to the satisfaction of the justices having cognizance

(1) 9 Geo. 4, c. 45.

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of the case, be liable on summary conviction to a penalty not exceeding 40s. for each offence.'

"Refreshments are supplied in this room on Sundays (during prohibited hours) to those persons only who are travelling to or by train. All those who may fictitiously obtain them, will subject themselves to penalties imposed as above-mentioned."

6. None of the four residents had come by train; and none of them were waiting for friends to come by that train: and the train was only a few minutes late.

7. The justices found as a fact that none of these four residents were "travellers," and were of opinion and adjudged that none of them required or needed refreshment, and to none of them, especially to the one who did not go by the train, but came from his house to see his son go, and then returned home, was the ale or sherry which they drank refreshment to them in the proper interpretation of refreshment as applied to travellers.

8. The attorney for the appellant argued to the contrary of the conclusions stated in the 7th paragraph, and cited several decisions in support of his argument; but the justices held that none of those decisions governed the present case, the facts therein being different from those found by them. A fourth magistrate, who sat with them, thought that the information ought to be dismissed.

The questions of law arising on the above statement for the opinion of the Court were,—1. Whether the four residents were all travellers, as intended by the Act of Parliament. 2. Whether the ale and wine were refreshment taken and needed by them as travellers.

Gray, Q.C., for the appellant. In stating a case under this statute, it is the duty of the justices to disclose all the facts and reasons on which their decision was founded; and it is for the Court to say whether the facts found warranted the conviction. There is nothing here to shew that the landlord of the Queen's Hotel did not bonâ fide believe all the persons who were supplied with refreshments at the bar to be travellers. It appears that all except one of them (who came to see his son off) went by the train which was just due. Under 11 & 12 Vict. c. 49, s. 1, the innkeeper commits no offence unless he opens his house for the sale of wine, beer, &c., during the prohibited hours on Sunday, otherwise than

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for refreshment for travellers. To justify a conviction, it must be shewn that he knew the persons supplied not to be travellers: *Taylor* v. *Humphries* (1); *Peache* v. *Colman*. (2) Montague Smith, J., in *Peache* v. *Colman* (3), says: "For anything that appeared to him (the defendant), these persons may all have arrived by the train; or it may be that some of them had come from Sevenoaks (4) to meet friends whom they expected to arrive by the train. I think they might equally be treated as travellers in the latter case, and that it would be very hard if, under such circumstances, they could not be supplied with refreshment." The justices here seem to have acted on a mere suspicion that the three townsmen went by the train merely because they found themselves discovered, intending to get out at the next station.

[KEATING, J. Knowledge on the part of the landlord is a fact which ought to be found by the magistrates.]

C. Hopwood, contrà. There was abundant evidence to support the conviction. The appellant clearly was guilty of an infringement of the statutory prohibition. Three, at all events, of the persons who were supplied with liquor were shewn not to be travellers, giving to the word its most liberal interpretation. Persons residing in a village closely adjoining the station could hardly be travellers needing refreshment. In the judgment of the Court in *Taylor* v. *Humphries* (1), great reliance is placed upon the local knowledge of the magistrates; and credit must be given to them for the inferences they draw from the evidence submitted to them.

Gray, Q.C., in reply.

WILLES, J. I am of opinion that the conviction in this case must be quashed. It is most important that full effect should be given to laws which are passed for the purpose of preserving the sanctity of the day of rest. That purpose, however, is to be attained by fair means; and not by drawing strained constructions, or by the imposition of penalties where no intention to do wrong is evinced on the part of the person sought to be punished. I cannot conceive anything more calculated to set people against

(1) 17 C. B. (N.S.) 539; 34 L. J. (M.C.) 1.

(2) Law Rep. 1 C. P. 324. 12 Jur. N.S. 273.

(3) Law Rep. 1 C. P. at p. 328. 12 Jur. N.S. 273.

(4) Which was about a mile distant.

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the law for closing public-houses on Sunday, than that penalties should be imposed upon inn-keepers who do their best to confine the supply of refreshment during the prohibited hours to bonâ fide travellers. The personal liberty of travellers would be restrained beyond what is reasonable if they were prevented from obtaining necessary meat and drink because Divine service happens to be going on. The law has made an exception in favour of persons who travel on the Sunday, whether on business or for pleasure. The innkeeper is bound to supply them with refreshment. If a man makes pretence of being a traveller, for the mere purpose of indulging his desire for drink, he violates the law, and incurs a penalty. (1) The landlord is restrained in another way. If he opens his house during the prohibited hours under circumstances which afford no explanation or excuse for his so doing, the conclusion may very fairly be arrived at that he opens it for the purpose of supplying beer, &c., to persons who have no right to demand it. It may be proper that the landlord should in such a case be called upon to give some explanation. In the present case, the place where the eight men were found drinking was in substance no more than the refreshment-room at the railway station. It communicated with the railway platform, and was called the Refreshment Room, a place provided at most stations for travellers to resort to before or after a journey. In this refreshment-room were eight persons, four of whom were inhabitants of the neighbouring town. Seven of them afterwards travelled by the train, which was just due; and the eighth had gone to the station for the purpose of seeing his son off. Primâ facie, therefore, the place was opened for the purpose of supplying drink to persons who were travellers. There was nothing in the character or appearance of the persons there to call upon the landlord to assume that any of them were not travellers. As to the three residents, it seems to me to be rather straining the facts to assume that they went off by the train for the mere purpose of disarming suspicion. I see no reason for coming to the conclusion that any of the seven were acting improperly. What is there to shew that the landlord, who opened his house for a strictly legitimate purpose, was aware that there were persons there obtaining refreshment who had no right to be

(1) See 32 & 33 Vict. c. 27, s. 16.

there? If he had been guilty of negligence in abstaining from making any attempt to limit the supply to travellers, that might be evidence that he opened his house for the supply of liquor generally, and not merely as refreshment for travellers. But nothing is shewn here to convict him of any intention to violate the law. By the notice stuck up in the refreshment-room, and by the directions given to his servants, he does all he can to prohibit drinking by any persons except travellers. There is an entire absence of any conduct on his part, active or passive, which could furnish evidence of an intention to break the law. That being so as to the first question, viz. whether the four residents were travellers within the meaning of the Act of Parliament, the next question is whether the ale and wine were refreshments taken and needed by them as travellers. I see nothing in the amount of refreshment supplied to shew that it was extravagant or excessive: and we do not sit here to administer a sumptuary law. I see no evidence upon which the magistrates could properly come to the conclusion that the appellant on the occasion in question opened his house for any other than a lawful purpose.

KEATING, J. I am entirely of the same opinion. If the facts would have warranted the magistrates in finding, and they had found, a want of bona fides on the part of the appellant, that would have been strong evidence that he opened his house for a purpose not sanctioned by the law. But there is no such evidence, and no such finding. He had put up a notice to intimate that refreshments were supplied within certain hours on Sunday only to travellers; and it is found that he had given directions to his servant to the same effect, and that his direction had been complied with in all but two instances. That omission, however, is not sufficient to shew a want of bona fides on the part of the landlord; and there was nothing in the circumstances of the case to challenge the attention of the landlord, nothing to shew that he wilfully violated the law. The question is not whether the persons who obtained the refreshment, or any of them, were conscious of violating the law, but whether the appellant wilfully violated it. The facts should be clearly shewn, to bring the case within a penal Act.

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MONTAGUE SMITH, J. I am of the same opinion. There is not enough either in the evidence or the finding of the magistrates to support the conviction. It does not appear that the appellant opened his house otherwise than for the refreshment of travellers. The magistrates find as a fact that the four residents in Todmorden were not travellers; but they do not find that the appellant knew it. The whole facts are consistent with his entire innocence. The conviction must be quashed.

Gray asked for the costs of the appeal, which by s. 6 of the statute (20 & 21 Vict. c. 43) are in the discretion of the Court.

WILLES, J. Hitherto, influenced by the notion that we are dealing with public officers who are acting in the performance of a public duty, we have abstained from allowing the appellant costs on quashing a conviction under 11 & 12 Vict. c. 49 and the other Acts relating to this subject. In the present case the respondent is a serjeant of police. The information was laid by him under the direction of his superiors, and was sustained by a majority of the justices. However, it is impossible to fail to perceive that the principles laid down by this Court in several cases have not been comprehended by the magistrates, or have failed to be acted upon by them. It must for the future be understood that the burthen of proof lies upon the informer, and that a conviction ought not to take place unless the magistrates are satisfied that the innkeeper, when supplying refreshment within the prohibited hours, is cognizant of the fact that the parties asking for it are not travellers. In future cases where this rule is disregarded, the Court will be advised whether the conviction ought not to be quashed with costs. On the present occasion, however, we give no costs.

Conviction quashed. (1)

Attorneys for appellant: *Rickards & Walker.*

Attorneys for respondent: *Shaw & Tremellen, for Eastwoods, Todmorden.*

(1) See *Morgan* v. *Hedger*, ante, p. 485.

STANLEY, APPELLANT; MORTLOCK, RESPONDENT. 1870 *June* 30.

Turnpike Act (3 *Geo.* 4, *c.* 126), *s.* 41—*Liability for avoiding Toll—Leaving Carriage on a Highway.*

By the General Turnpike Act (3 Geo. 4, c. 126), s. 41, it is provided that if any person shall leave upon a turnpike road any horse, cattle, beast, or carriage whatsoever, by reason whereof the payment of any tolls or duties shall be avoided or lessened, he shall forfeit any sum not exceeding 5*l.*

A. was driven by his coachman from his house along a turnpike road up to but not through a turnpike gate. A. then got out and walked through the gate to a railway station beyond it, and went away by a train, and his coachman drove the carriage back to his house:—

Held, that A. had not left his carriage upon the road within the meaning of the Act, and had not therefore incurred the penalty imposed.

CASE stated by Justices under 20 & 21 Vict. c. 43.

The respondent laid a complaint or information before justices for the county of Cambridge against the appellant for having left upon the turnpike road from Royston, in the county of Hertford, to Wandesford Bridge, in the county of Huntingdon, a certain carriage or waggonette drawn by two horses, by reason whereof the payment of tolls at the Old North Road gate was evaded, contrary to the statute 3 Geo. 4, c. 126, s. 41. (1) The magistrates

(1) 3 Geo. 4, c. 126, s. 41:—"If any person shall with any horse, cattle, beast, or carriage go off or pass from any turnpike road through or over any land or ground near or adjoining thereto (not being a public highway, and such person not being the owner or occupier, or servant, or one of the family of the owner or occupier of such land or ground), with intent to evade the payment of the tolls granted by any Act of Parliament; or if any owner or occupier of any such land or ground shall knowingly or willingly permit or suffer any person (except as aforesaid) with any horse, cattle, beast, or carriage whatsoever to go or pass through or over such land or ground with intent to evade any such tolls; or if any person shall give or receive from any person other than the collectors of the tolls, or forge, counterfeit, or alter any note or ticket directed to be given with intent to evade the payment of the tolls, or any part thereof; or if any person shall fraudulently or forcibly pass through any such toll gate with any horse, cattle, beast, or carriage, or shall leave upon the said road any horse, cattle, beast, or carriage whatsoever by reason whereof the payment of any tolls or duties shall be avoided or lessened; or shall take off, or cause to be taken off, any horse or other beast or cattle from any carriage either before or after having passed through any toll-gate, or having passed through any toll-gate, shall afterwards add or put any horse or other beast to any such carriage, and draw therewith upon any part of any

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convicted the appellant of the offence, and stated a case, of which the following is the substance.

1. Upon the hearing of the complaint, it was proved that there was a turnpike gate, situated in the parish of Longstown, in the county of Cambridge, on the road leading from Royston, in the county of Hertford, to Wandesford Bridge, in the county of Huntingdon, and that the respondent was the party duly appointed to collect the tolls at the gate.

2. The tolls payable on the road are collected under and by virtue of 3 Geo. 4, c. lxviii., s. 25.

6. It was further proved that the turnpike gate was situated about 100 yards from the Old North Road railway station, on the Bedford and Cambridge Railway, and the appellant was, on the 25th of September, 1869, with some of his friends driven by his coachman in a waggonette, drawn by a pair of horses, along the road to within about 140 yards of the turnpike gate, and the appellant and his friends then got out of the waggonette, and walked through the turnpike gate to the railway station, carrying with them some small articles of luggage, but the heavy portions of their luggage had been previously sent through the gate in a cart, the person in charge of which had paid the proper toll.

7. The waggonette was in charge of the appellant's coachman, and was by him driven back to the appellant's house. The waggonette had on the day in question been driven upwards of a quarter of a mile in one direction along the turnpike road between the appellant's lodge gate and the toll gate.

8. No toll was paid by the appellant, nor demanded from the appellant, in respect of the waggonette, because it was known to the respondent that the appellant wished to raise the question now raised.

9. The appellant left by the train, and did not return that day.

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turnpike road, so as to increase the number of horses or other beasts drawing the said carriage after the same shall have passed through any toll-gate whereby the payment of all or any of the tolls shall or may be evaded; or if any person shall do any other act whatever in order to or with intent to evade the payment of all or any of the tolls, and whereby the same shall be evaded, every such person shall for every such offence forfeit and pay any sum not exceeding 5*l*."

10. On these facts, the justices were of opinion that there was nothing in the provision of the local Act (3 Geo. 4, c. lxviii.) to exempt the appellant from the payment of the toll. That the local Act was passed prior to, and is itself amended and controlled by the general Act (3 Geo. 4, c. 126), which is intitutled "An Act to amend the general laws now in being for regulating Turnpike Roads in that part of Great Britain called England." That the appellant was not within the exemption allowed by s. 32 of the general Act, and therefore the appellant was, under the circumstances above stated, liable, under s. 41, to pay toll for the said waggonette.

11. The question of law arising on the above statement of facts is, whether or not under s. 41 of 3 Geo. 4, c. 126, the appellant was rightly convicted of leaving the said waggonette on the said road, whereby the payment of toll at the said gate was evaded.

12. If the Court should answer the said question in the affirmative, then the conviction is to stand with costs; but if the Court should answer the question in the negative, the complaint and information is to be dismissed.

Graham, for the appellant. The only question is whether the appellant's act comes within the words of the part of section 41 mentioned in the information. The offence there mentioned does not turn upon the intent, but the appellant must have left a carriage on the road, and thereby evaded payment of toll. The carriage here was not left on the road, for the words of the section cannot mean only getting out of the carriage and letting it proceed. The carriage must at any rate be left standing still on the road. It may be that if the appellant had left the carriage standing in the road while he went through the turnpike to the station and came back, he would have been liable; but it is very doubtful whether he would then. The difference between avoiding toll and avoiding becoming liable to it, is pointed out in *Veitch* v. *Trustees of Exeter* (1), and it is very doubtful whether a person can be said to avoid payment of toll unless he has done something which ought to render him liable to toll. The Acts only impose a toll on persons passing through a turnpike gate, and it would

(1) 8 E. & B. 986; 27 L. J. (M.C.) 116. 4 Jur. N.S. 584

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seem that unless a person has in some way got his carriage and horses, or some of them, from one side of the gate to the other, he cannot be said to have avoided the toll. The cases contemplated by the Act would seem rather to be where a waggon and four horses come to a gate and the waggoner takes out three horses and leaves them on the road and goes through to his destination on the other side with one horse only, and then re-attaches the other horses again as he returns; or where he leaves the waggon on the road and takes the horses through the gate to a stable beyond. The succeeding clause refers apparently to cases where horses in a waggon pay higher toll than those not in harness, and when therefore three of the four horses might be taken out and taken through the gate out of harness and re-attached the other side, the whole of the carriage and horses thus passing the gate but paying less toll. Whatever, however, be the true meaning of the Act, it is sufficient that in the present case there was no leaving of a carriage on the road.

Naylor, for the respondent. The question intended to be raised by the respondent is whether the appellant, having driven more than 100 yards along the road, was not liable for toll whether he passed through a gate or not. If he had not got out at all but simply turned round and driven back, he would have been equally liable. The Act refers only to tolls at gates, because it is only necessary to give authority to block the road. He referred to *Phipson* v. *Harvett.* (1)

Graham, in reply. There is no authority for saying that toll can be collected except for passing through a gate, and if there was it would be conclusive for the appellant, as he then would not have evaded the toll by acting as he did.

WILLES, J. We must look at the information laid against the appellant, and see if the offence alleged in it has been committed; the information alleges that the defendant did leave upon the turnpike road from Royston in the county of Hertford to Wandesford Bridge in the county of Huntingdon, a certain carriage or waggonette drawn by two horses, by reason whereof the payment of tolls at the Old North Road gate was evaded. The fact is that

(1) 1 C. M. & R. 473.

the appellant wanted to go to a railway station between which and his house the turnpike gate lay; he drove more than 100 yards along the road, but when he came near the gate he chose to get out and to walk on to the station. He left his carriage upon the road in the sense of quitting it, but not in the active transitive sense of leaving it standing on the road. In popular language, if he had been asked where did you leave your carriage, he would have said I did not leave it on the road, I sent it home. The question, therefore, is whether the statute means leaving a carriage in the sense of quitting it, or in the sense of leaving it waiting on the road: the latter is the true construction. There are many cases to which the section might apply even without saying that a person who finds himself in a mind to leave his carriage standing on the road and to walk on through a turnpike gate, is bound to pay the toll on passing through it, though there are no words in the Act distinctly imposing it. The cases which might be conceived would be of a person driving up to a gate with a carriage having peculiar wheels or several horses, and either leaving the carriage and taking on the horses, or leaving some of the horses and taking on the carriage, or that having business so near the other side of the gate that it really made no difference whether he took the carriage or horses through or not, he left them waiting on the road, simply to avoid the toll. However, without going further, it seems to me that the point on which the respondent in the present case fails, is, that there was no leaving of a carriage on the road within the meaning of the Act.

KEATING, J. I am of the same opinion; it is not necessary to decide some of the points which have been raised, because we have only to decide whether the facts bring the appellant strictly within the words of the section. Now I agree with the construction that has been already put upon them; viz., that where the statute says shall leave upon the road any carriage, it certainly does not necessarily import quitting it, but more naturally means leaving the carriage waiting there while he passes through the gate, but here it appears that the appellant drove up near to the gate and got out, and that the carriage was not left on the road, but driven back to his house.

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MONTAGUE SMITH, J. I am of the same opinion. The offence must be within the words of the statute: "shall leave upon the said road any horse, cattle, beast, or carriage whatsoever, by reason whereof the payment of any tolls or duties shall be avoided or lessened." Now the offence consists of two things: first, the leaving a carriage on the road; and, secondly, the effect of that leaving, viz., the avoiding the toll. Here the overt act is not established, for when a man gets out of his carriage which does not remain stationary on the road, it is not a leaving it upon the road within the meaning of the Act; therefore, it is unnecessary to consider what was the effect of the appellant's conduct in this case. What would come within the words of the Act, it is not necessary to determine; but one can quite understand it might be contended that if a person left his carriage standing outside of a town and went into the town and did his business, and came out again and drove the carriage back, it would be within the Act, but we need not determine that; nor need we determine the point raised by the defendant, that any person driving 100 yards along the road is liable to pay toll whether he passes through a gate or not; that does not seem to be so under the special Act referred to in this case, and if it had been so, the proceeding here would not have been for avoiding payment of toll, but for not paying it.

Judgment for the appellant.

Attorneys for appellant: *J. & C. Cole, for Foster, Cambridge.*

Attorneys for respondent: *F. & T. Smith & Sons, for Mortlock, Caxton.*

[BRISTOL ELECTION PETITION.]

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BRITT, PETITIONER; ROBINSON, RESPONDENT.

Corrupt Practices Prevention Act, 1854 (17 & 18 *Vict. c.* 102)—*Test-Ballot—Bribery and Treating—Special Case—Costs.*

On a vacancy in the representation in parliament for the city of B., three liberal candidates, viz. R., H., and O., offered themselves. It was arranged between them that a "test-ballot" should be taken, and that the one at the head of the ballot should alone stand for the city in the liberal interest, and that the others should support him. The test-ballot was taken, and R. had a majority of votes. H. and O. retired. Subsequently a conservative candidate came forward, and went to the poll against R. R. was returned. A petition was presented against the return of R., on the ground that, after the receipt of the writ for the election, two agents of R. gave money, and one gave drink to voters, to induce them to vote for R. on the occasion of the test-ballot.

Upon a case stated for the opinion of the Court, pursuant to s. 11 of the Parliamentary Elections Act, 1868 (31 & 32 Vict. c. 125), in which it was found that "such giving was corrupt;" but that "no bargain was expressly or impliedly made as to their votes on the election, nor did the voters understand or suppose that their votes at the election were bought or engaged, or in any way bargained for:"—

Held, that the giving the money and drink for the purpose above described was bribery and treating within s. 2, sub-s. 3, and s. 4, of the Corrupt Practices Prevention Act, 1854, and avoided R.'s election.

AT the last parliamentary election for the city of Bristol, Mr. E. S. Robinson was returned. A petition against his return was duly presented and tried before Bramwell, B., on the 23rd and four following days of May, 1870, when the learned Baron, with the consent of the parties, reserved for the opinion of this Court a question which arose, as follows:—

On the occurring of the vacancy in the representation which gave occasion for Mr. Robinson's election, three candidates, of whom he was one, appeared in the liberal interest. The state of the register was such that, in the event of the liberal party being undivided, their candidate was considered to be certain of success; and confident expectations were entertained that he would not even be opposed. On the other hand, in the event of the three candidates going to the poll, the chances were that a conservative would be returned. It was therefore arranged that one only of the three candidates should stand, and that a test-ballot should be

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taken, to ascertain which of the three it should be,—it being agreed between the three candidates, their friends and supporters, that whichever of them should have the greatest number of votes should be the one to stand, and that they themselves would support him, and that, as far as they could, they would influence the voters in their interest to support him. The persons to vote were to be all the voters for the city, except certain voters who had on a former occasion plumped for a conservative candidate.

This arrangement was carried into effect. The ballot took place. Mr. Robinson had a very large majority. The other two retired, and he remained the sole candidate on the liberal side. A conservative candidate afterwards appeared. He and Mr. Robinson went to the poll; and Mr. Robinson was elected. Mr. Robinson received, as arranged, the support of many voters who would have preferred one or other of the two retiring liberals.

On the occasion of the test-ballot, and after the receipt of the writ for the election, two agents of Mr. Robinson gave trifling sums of money to voters to vote for Mr. Robinson at the test-ballot; and one agent gave drink to voters for the same purpose. Such giving was corrupt. Some of the voters so dealt with voted at the test-ballot for Mr. Robinson. Their number was small, compared with his majority at the test-ballot. Others of them voted for other candidates. Some at the election voted for the conservative.

Both the giving of the money and the giving of the drink, if given to induce the voter to vote at the election, would have been within the 2nd and 4th sections (1) of the Corrupt Practices Pre-

(1) Sect. 2. "The following persons shall be deemed guilty of bribery, and shall be punishable accordingly:—

"1. Every person who shall, directly or indirectly, by himself or by any other person on his behalf, give, lend, or agree to give or lend, or shall offer, promise, or promise to procure or to endeavour to procure, any money or valuable consideration to or for any voter, or to or for any person on behalf of any voter, or to or for any other person, in order to induce any voter to vote or refrain from voting, or shall corruptly do any such act as aforesaid on account of such voter having voted or refrained from voting at any election:

"2. Every person who shall, directly or indirectly, by himself or by any other person on his behalf, give or procure, or agree to give or procure, or offer, promise, or promise to procure or to endeavour to procure, any office, place, or employment to or for any voter, or to or for any person on behalf of any voter, or to or for any other person, in order to induce such voter to vote or refrain from voting, or shall corruptly do any

vention Act, 1854 (17 & 18 Vict. c. 102), and would have avoided the election. But both the giving of the money and of the drink were solely for the purpose of bribing and treating the voters, to induce them to vote at the test-ballot. No bargain was expressly or impliedly made as to their votes on the election: nor did the voters understand or suppose their votes at the election were bought or engaged, or in any way bargained for. So that, supposing such a practice legal or fair, they might still have legally and fairly voted against Mr. Robinson, or not at all.

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such act as aforesaid on account of any voter having voted or refrained from voting at any election:

"3. Every person who shall, directly or indirectly, by himself or by any other person on his behalf, make any such gift, loan, offer, promise, procurement, or agreement as aforesaid to or for any person, in order to induce such person to procure or endeavour to procure the return of any person to serve in parliament, or the vote of any voter at any election:

"4. Every person who shall, upon or in consequence of any such gift, loan, offer, promise, procurement, or agreement, procure, or engage, promise, or endeavour to procure, the return of any person to serve in parliament, or the vote of any voter at any election:

"5. Every person who shall advance or pay, or cause to be paid, any money to or to the use of any other person, with the intent that such money or any part thereof shall be expended in bribery at any election, or who shall knowingly pay or cause to be paid any money to any person in discharge or re-payment of any money wholly or in part expended in bribery at any election:

"And any person so offending shall be guilty of a misdemeanour, and in Scotland of an offence punishable by fine and imprisonment, and shall also be liable to forfeit the sum of 100*l.* to any person who shall sue for the same, together with full costs of suit: Provided always, that the aforesaid enactment shall not extend or be construed to extend to any money paid or agreed to be paid for or on account of any legal expenses bonâ fide incurred at or concerning any election."

Sect. 4. "Every candidate at an election who shall corruptly, by himself, or by or with any person, or by any other ways or means on his behalf, at any time, either before, during, or after any election, directly or indirectly give or provide, or cause to be given or provided, or shall be accessory to the giving or providing, or shall pay wholly or in part any expenses incurred for any meat, drink, entertainment, or provision to or for any person, in order to be elected or for being elected, or for the purpose of corruptly influencing such person or any other person to give or refrain from giving his vote at such election, or on account of such person having voted or refrained from voting, or being about to vote or refrain from voting at such election, shall be deemed guilty of the offence of treating, and shall forfeit the sum of 50*l.* to any person who shall sue for the same, with full costs of suit; and every voter who shall corruptly accept or take any such meat, drink, entertainment, or provision, shall be incapable of voting at such election, and his vote, if given, shall be utterly void and of none effect."

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The question was, nevertheless, were both or either of these cases of bribing and treating for the vote on the test-ballot, within the sections referred to.

O'Malley, Q.C. (*Sleigh, Serjt.*, and *Ffooks*, with him), for the petitioner. The statement of the case discloses bribery and treating within s. 2, sub-s. 3, and s. 4 of the Corrupt Practices Prevention Act, 1854 (17 & 18 Vict. c. 102). It may be assumed that the bribery and treating did influence the test-ballot, and did procure a majority in favour of Mr. Robinson. Even if the bribery did not influence the return of Mr. Robinson, the election is nevertheless void: *Blackburn Case* (1); *Bradford Case.* (2) The object of the bribery and treating at the test-ballot here undoubtedly was to secure the return of Mr. Robinson at the election; and its result was supposed to be decisive of the event. The candidate who should be at the head of the test-ballot was certain to be head of the poll at the election if no conservative candidate presented himself, and almost certain if one did. The bribery, therefore, was clearly with a direct view to the approaching election. It has been held that misconduct with reference to a municipal election, as operating on a parliamentary election, may constitute an offence within this Act. (3) So, paying the expenses of voters attending the registration courts to support their votes, when done for the purpose of influencing their votes at the ensuing election, has been declared to be illegal: *Hastings Case.* (4) The object of the Act was to meet every device for influencing votes. The exercise of undue influence by a landlord over his tenants, or by a manufacturer over his men (5), or lavish expenditure on the charities in the neighbourhood (6), with a view to an approaching election, all come within the prohibition of the Act, and render the election void. But for the proviso at the end of s. 2, the employment of paid canvassers would be illegal: *Bradford Case.* (7) Such was evidently the opinion of the framers of this

(1) 1 O'M. & H. Elect. Cas. 198, 202.
(2) 1 O'M. & H. 35, 40.
(3) See *Beverley Case*, 1 O'M. & H. at pp. 143, 150; *Southampton Case*, 1 O'M. & H. at p. 226.
(4) 1 O'M. & H. at p. 219.
(5) *Westbury Case*, 1 O'M. & H. 47, 50.
(6) *Stafford Case*, 1 O'M. & H. 228, 230.
(7) 1 O'M. & H. 32.

part of the Act, which is but a substitution for a similar provision in 49 Geo. 3, c. 118. A gift of money for the purpose of inducing a candidate to retire from the contest would avoid the election. So, if A. agree with B. that, if B. will abstain from opposing A. at the then election, A. will abstain from opposing or voting against B. at a future election, it would be a corrupt bargain.

[WILLES, J., referred to the *Coventry Case.* (1)]

This device of the test-ballot was clearly a mode of endeavouring to procure the votes of voters at the election for whichever of the three liberal candidates should be at the head of the test-ballot.

[MONTAGUE SMITH, J. The finding that "no bargain was expressly or impliedly made as to their votes on the election, nor did the voters understand or suppose their votes at the election were bought or engaged, or in any way bargained for," raises some difficulty.]

The effect of that finding may be to take the case out of sub-s. 1 of s. 2; but, assuming that the persons bribed to vote for Robinson at the test-ballot were left free to vote at the election as they liked, still it would be endeavouring to procure for Robinson the votes of those who voted at the test-ballot, within sub-s. 3. The question is, what was the intention of the briber. That of the persons bribed is altogether immaterial. It is found that the thing was corruptly done; and that its object was to place Robinson at the top of the test-ballot, and so to secure for him at the election the votes of all the liberal voters, or at all events to induce them to refrain from voting against him. The case may come within sub-s. 1 of s. 2, but it is clearly within sub-s. 3, and s. 4. The *Harwich Case* (2) and the *Barnstaple Case* (3) were also referred to.

Mellish, Q.C. (*Ballantine, Serjt., J. O. Griffits,* and *Chandos Leigh,* with him), for the respondent. The question referred to the Court is, whether both or either of the cases of bribery and treating mentioned in the case are within the 2nd and 4th sections of the Corrupt Practices Prevention Act, 1854. Those enactments are

(1) 1 O'M. & H. 97. (2) 2 Pow. R. & D. 223.
(3) 2 Pow. R. & D. 336.

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highly penal, and must receive the same construction that they would receive upon an indictment for a misdemeanour. The offence charged must be brought within the letter and the spirit of the enactments; and the Court is bound by the conclusions of fact arrived at by the learned Baron who stated the case. The first sub-s. of s. 2 relates to the bribing the voter to vote or to refrain from voting at the election. This case is clearly not within that part of the enactment. Nor does it fall within the 2nd sub-s., which relates to the procuring or promising to procure for the voter some office, place, or employment, or within sub-s. 4, which relates to the recipient of the bribe. The 3rd sub-s. relates to the bribing of persons who may have influence over voters, in order to procure the return of a particular person or to vote for him at the election. This case does not fall within that enactment. The parties bribed were not bribed to vote for Mr. Robinson at the election, or to induce others to vote or to use their influence for the purpose of procuring his return. "Voting" means voting at the election. It relates to an act to be done at the poll.

[BOVILL, C. J. The test-ballot was a step towards the election; and the payment is found to have been corruptly made.]

The obvious meaning of that is, that it would have been a corrupt act if done with reference to the impending election; nothing more. Influence means influence over a voter at the election. All the cases cited entirely coincide with this view of the statute. Neither the 3rd clause nor the corresponding provision in the 49 Geo. 3, c. 118, has ever been held to apply to a case where the money was not given to purchase the influence of the person bribed at the election. Would an indictment lie for giving or receiving a bribe to vote at the test-ballot? Clearly not. *Cooper* v. *Slade* (1), and the judgment of Willes, J., in the *Coventry Case* (2), were also referred to.

BOVILL, C.J. A vacancy having occurred in the representation of the city of Bristol in parliament, Mr. Robinson, the respondent, became a candidate. His object was, to be returned as member of parliament for that city; and both he and his agents took steps for the purpose of procuring and securing his return. Looking at

(1) 6 H. L. C. 746. (2) 1 O'M. & H. 97, 100.

the state of political parties in the borough, the nature of the constituency, and the probability of success of each candidate, it was determined by Mr. Robinson and two other candidates in the same political interest, and their friends, that a certain course should be adopted, viz. that a test-ballot should be taken in order to secure the return of one of those three candidates to parliament. The whole proceeding was with a view to the election and return of one of the three liberal candidates A course was proposed which, if it had been honestly and fairly carried out, would have tested the feeling of the electors, and which virtually would determine who should represent the city of Bristol. I say that, because the learned Baron who tried the election petition has stated upon the case submitted for our judgment that "the state of the register was such that, in the event of the liberal party being undivided, their candidate was considered to be certain of success; and confident expectations were entertained that he would not even be opposed; and that it was therefore arranged that one only of the three candidates should stand, and that a test-ballot should be taken to ascertain which of the three it should be; it being agreed between the three candidates and their friends and supporters that whichever of them should have the greatest number of votes should be the one to stand, that they themselves would support him, and that, as far as they could, they would influence the voters in their interest to support him."

This test-ballot was one of the steps in the course of the proceedings towards the election, and was for the purpose of securing the return of one of the candidates in that particular interest. It is tolerably certain, from the statements in the case, that, if Mr. Robinson had not been at the head upon the test-ballot, he would not have been returned to parliament. It is equally clear from this statement, that, if he was at the head upon the test-ballot, then there was every expectation on his part that he would be returned; and, indeed, no one can doubt that there was almost a certainty of his being so returned.

Whether he was to be placed at the head of the ballot or not, depended on the influence that could be exerted in his favour by and with the voters who were to take part in the test-ballot. In order to secure the votes of the voters of that ballot, Mr. Robin-

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son's agents gave money and drink to voters, to induce them to vote for Mr. Robinson at the ballot, and it is found that such giving of money and drink to those voters was corrupt, that is to say, that it was to induce those voters, whether they desired to vote for Mr. Robinson or for another candidate, to give their votes, in consideration of money or drink, for Mr. Robinson, in order to place him at the head of the test-ballot. On such a finding in the case, that the money and the drink were given corruptly and for that purpose, if the test-ballot was to determine virtually the return to parliament of the candidate at the head of the ballot, it seems to me impossible to escape from the conclusion that the money and drink were thus given corruptly, in order to endeavour to procure the return of Mr. Robinson to serve in parliament.

If that be so, the case is brought directly and distinctly within the 3rd clause of s. 2 of the Act of 17 & 18 Vict. c. 102. That Act of Parliament was intended to prevent corrupt practices in the election of members of parliament. Throughout the clauses the legislature has made it penal and illegal to commit the corrupt practices which are mentioned, "*directly or indirectly.*" It was very well known that, in matters of this kind, persons could do indirectly and did indirectly that which would have exposed them to penalties if done directly; and every sort of scheme and contrivance from time to time had been resorted to for the purpose of evading the law against bribery. Almost every section of this Act prohibits the doing of the matters which are referred to, directly or indirectly. The 3rd clause of s. 2 enacts that "every person who shall directly or indirectly make any gift to any person, in order to induce such person to endeavour to procure the return of any person to serve in parliament," shall be deemed guilty of bribery. I have left out the intermediate words; but that is the enactment. Then, after the words, "endeavour to procure the return of any person to serve in parliament," are the words "or the vote of any voter at any election." The last words of that clause distinctly shew that it is bribery to endeavour by gifts to procure the vote of a voter. The votes of voters are the direct means of obtaining the return of a member to parliament. But the earlier part of the section seems to me to be directed to larger objects, viz. to prohibit the doing directly or indirectly of certain acts in

order to procure or endeavour to procure the return of a person to serve in parliament, by means other than those of procuring the vote of a voter. That is the construction which I place on the 3rd clause of the section. And that being, as I think, the true construction of the Act, it would apply to and include the present case. There was here a corrupt doing of certain acts, viz. the payment of money and the giving of drink for the purpose of attaining the object which Mr. Robinson had in view, viz. being returned to parliament. The object of the test-ballot was, to determine who should be the member; the fact being that the test-ballot would virtually determine the election, at least in the estimation of Mr. Robinson and his agents. And his agents, with that knowledge, and for the very purpose of securing his return to parliament, by placing him at the head of the test-ballot, corruptly paid this money and gave the drink. If such a case as this does not come within the Act of Parliament, it is impossible to say what consequences might not follow. If, as is contended, the legislature has not directed its attention to practices of this kind, and included them within the Act, it would be perfectly competent to any number of persons to institute a test-ballot, and for the man who had the largest and heaviest purse always to obtain the ascendency on the test-ballot, and thus secure his return against those not able or not willing to devote their money to purchasing corruptly, as was done in this case, the votes of the electors at the test-ballot. It seems to me that the Act of Parliament is abundantly sufficient to meet such a case, and that this case is brought within the 3rd clause of s. 2 of the Corrupt Practices Act.

WILLES, J. I am of the same opinion. I think it certainly is to be lamented that what was intended by Mr. Robinson in very good faith, I have no doubt, in order to prevent a split in his party, by lawful means, should turn out to his disadvantage, by reason of the misconduct of his agents. There can be no doubt whatever that, although in a criminal court or in a court of morals he would be absolved from any liability or slur for the acts which were committed by his agents without his knowledge, he is in this proceeding, upon grounds of public policy, responsible for their acts; and for the single reason that it is necessary, in order to secure purity

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of election, to impress upon the minds of subordinate agents that unlawful and corrupt acts which they may commit in the supposed interest of their principal, will, if discovered, in the end lead to his disadvantage and defeat; so that people who may be disposed to break the wholesome provisions of this Act of Parliament, or to violate the principles of the common law, may, if possible, be deterred from so doing.

Having looked at this case in every point of view suggested by the very able and ingenious arguments which have been addressed to the Court both on the part of the petitioner and on the part of the respondent, I am unable to arrive at any other conclusion than that the acts done by the agents of Mr. Robinson in bribing and treating people for the purpose of inducing them to vote for him at the test-ballot, although assumed to be without any view to securing the same votes when the election came on, are illegal both at common law and within the provisions of sub-sect. 3 of s. 2, of the Corrupt Practices Act, 1854.

The terms of that section are distinct and clear, and require no construction except giving the words their ordinary meaning; and reading them in their grammatical sense,—"every person who shall directly or indirectly, by himself or by any other person on his behalf, make any such gift, loan, offer, promise, procurement, or agreement as aforesaid" (the "agreement as aforesaid" being, as appears from the previous part of the section, an agreement involving a valuable consideration) "to or for any person, in order to induce such person to procure or endeavour to procure the return of any person to serve in parliament, or the vote of any voter at any election."

I quite agree with what was urged by Mr. Mellish, that the early part of that section, where it speaks of inducing such person to procure or endeavour to procure the return, is to be read with reference to the alternative "or the vote of any voter at any election;" and, reading the words "to procure or endeavour to procure the return," in an alternative construction, where that alternative occurs, the result is not that you limit the first branch of the alternative to matters which fall within the second, but that you read the first branch of the alternative, expressed in general words, as covering all the genus which the species struck at in the

other branch of the alternative does not include. Therefore, "to procure or endeavour to procure the return of any person to serve in parliament," in the first branch of the alternative means, to procure or endeavour to procure the return otherwise than by operating upon the vote of a voter under the second branch of the alternative.

All that the Court has to inquire, then, is, whether what was done in this case in paying money to voters and giving them drink to vote at the test-ballot, was in order to induce them "to endeavour to procure the return" of Mr. Robinson. It was paid directly to induce them to vote at the test-ballot. If Mr. Robinson had not been returned at the head of the poll on the test-ballot, he could not have been returned to serve in parliament at the election; for, by the agreement, which is part of the machinery with which we have to deal, each of the other two liberal candidates, one or the other of whom alone could stand in the way of his election, was to retire if not at the head of the poll. Therefore, Mr. Robinson could not have been returned unless he had been at the head of the poll; and the voter was paid for endeavouring to place him at the head of the poll.

So far for the negative part of the induction. Now for the affirmative. From the state of the register, there was an expectation, approaching to a certainty (which the result appears to have justified), that the person who was returned at the test-ballot, if he stood at the election, would be returned at the election. Therefore, negatively he would not have been returned, but for succeeding at the test-ballot, and affirmatively he expected to be returned at the election, and was all but sure of being so returned, if he was returned at the test-ballot. Mr. Robinson's agent paid the voter in order that the voter should endeavour to place him at the head of the poll at the test-ballot; and it seems to me that the conclusion follows logically that he paid the voter in order to induce him to endeavour by means appropriate and conducive to the result to procure Mr. Robinson to be returned at the election.

I quite agree that criminal enactments are not to be extended by construction. When an offence against the law is alleged, and when the Court has to consider whether that alleged offence falls within the language of a criminal statute, the Court must be

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satisfied, not only that the spirit of the legislative enactment has been violated, but also that the language used by the legislature includes the offence in question, and makes it criminal. As to the spirit of these enactments being violated, little doubt has been suggested; and I certainly can entertain none that the letter applies to the case.

It appears to me that the proper answer to the question which has been put to us by the learned Baron who tried the case, is, that the cases are cases of bribery within the first of the sections referred to, viz. s. 2, sub-s. 3.

As to what the precise form of the judgment should be upon this special case, it may be necessary to refer to the section of the Parliamentary Elections Act, 1868. The parties appear to have agreed that the case should come before us in this form, and probably the proper course would be to draw up a rule of Court upon reading the special case, and embodying the decision of the Court in the terms in which it has been pronounced.

BYLES, J. I am of the same opinion. I do not pretend not to have entertained doubts upon this subject. When I first read the case, I thought it was an extremely doubtful question; and those doubts have returned upon hearing the argument of Mr. Mellish. But I now think that this money was, within the meaning of s. 2, sub-s. 3, money paid to induce voters to endeavour to procure Mr. Robinson's return. As has already been observed at the bar, he was certain to be returned if he was at the head of the test-ballot. He was certain not to be returned if he was not at the head of the test-ballot. The best, the only, and the certain way of securing his return was to put him at the head of the test-ballot; and every voter who voted for him at the test-ballot was by this certain method endeavouring to procure his return. It is the same thing as if the whole of the voters at the test-ballot had been bribed, and their votes bought. It is the same thing as if the result of the test-ballot had turned on a single vote, and that vote had been bought, and the voter bribed. Here, therefore, it seems to me, the object of the payment was corruptly to influence the election in the way that I have described, and therefore that Mr. Robinson was not duly elected.

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MONTAGUE SMITH, J. I am of the same opinion. I come to the conclusion that the purchase of the votes for the test-ballot, under the circumstances stated in this case, is within both the spirit and the words of the 3rd sub-section of s. 2 of the Act. The learned Baron who tried the election petition has found that giving the money was corrupt, and that, if it had been given to induce the voter to vote at the election, the gift would have been within s. 2 of the Corrupt Practices Act, and would have avoided the election. There is a distinct finding that the payments were corrupt in the intention with which they were made by the agents of Mr. Robinson; and there is a further finding that the giving of money and drink to the voters was for the purpose of inducing them to vote at the test-ballot. They were, therefore, corrupt payments, to induce the voters to vote for Mr. Robinson at the test-ballot.

What was the consequence of their voting for him at the test-ballot? The consequence of it was, under the arrangement which had been made for the purpose of taking that test-ballot, to assist in putting him in a position, by the result of the test-ballot, in which his election would be in all reasonable expectation certain. It seems to me, therefore, that the votes which were given at the test-ballot were votes given to procure his election, or to endeavour to procure his election; and, if those votes were given to endeavour to procure his election, then the illegality is clear; for, it is confessed that they were purchased votes, and corruptly purchased votes.

That being so, it seems to me that the case falls directly within this section, which says that "every person who shall, directly or indirectly, by himself or by any other person on his behalf, make any such gift, loan, offer, promise, procurement, or agreement as aforesaid, to or for any person, in order to induce such person to procure or endeavour to procure the return of any person to serve in parliament, or the vote of any voter at any election, shall be deemed guilty of bribery." It seems to me that this was an endeavour to procure the return to parliament by means of purchased votes which should place Mr. Robinson at the head of the poll at the test-ballot. It certainly does not seem to me too remote from the return, because the direct and immediate result of being placed

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at the head of the test-ballot was, if not to secure his election, at all events very greatly to further it. Therefore it was, as it seems to me, in the words of the Act, an endeavour to procure his return.

Mr. Mellish has argued that this section is aimed at the corrupt practice of persons giving money to any one to secure the influence of such person at the election. Assume that that is so, it seems to me that the money was given here to the voter to secure such influence as he had and could use for the purpose of procuring the return. His influence was important. It was, not his vote, which could only be given at the election, but his voice at the preliminary ballot, which was an influence, and a very powerful influence, that he could use in order to put Mr. Robinson in a position where his return was reasonably certain. It seems to me, therefore, according to that view of the Act, there was a purchase of the influence of the voter for the purpose of the test-ballot.

One mode of trying this would be, to suppose the case to have occurred which I suggested during the argument, that Mr. Robinson had purchased, or that an agent for him had purchased, the votes of 200 electors, with a distinct agreement that they were for the test-ballot only, and that they were free to vote for anybody they liked at the election. Such a purchase might, under given circumstances, have put the purchaser at the head of the test-ballot. It would not be a gift in order to procure the votes at the election itself, but certainly, as it seems to me, it would be purchasing the influence of all those persons, and therefore it would be giving money to those persons for the purpose of inducing them to endeavour to secure the return. It appears upon the case that there were not here any corrupt practices on the wholesale scale I have adverted to; but, in order to test whether there are corrupt practices within the Act, it is necessary to look not only at what is the effect of the acts which were done in this case, but what might be the effect of such acts, if the Court were to sanction them either on a small or a great scale.

It seems to me, for these reasons, that this case is brought within the Corrupt Practices Act, and that consequently Mr. Robinson cannot retain his seat.

June 16. *O'Malley, Q.C.*, for the petitioner, asked for the costs

of the special case. The provision in the statute 31 & 32 Vict. c. 125, as to costs, is contained in s. 41, which enacts that "all costs, charges, and expenses of and incidental to the presentation of a petition under this Act, and to the proceedings consequent thereon, with the exception of such costs, charges, and expenses as are by this Act otherwise provided for (1), shall be defrayed by the parties to the petition in such manner and in such proportions as the Court,"—which, in its application to England, is, by ss. 2, 58, declared to mean the Court of Common Pleas at Westminster,—" or judge may determine, regard being had to the disallowance of any costs, charges, or expenses which may in the opinion of the Court or judge, have been caused by vexatious conduct, unfounded allegations, or unfounded objections on the part either of the petitioner or the respondent, and regard being had to the discouragement of any needless expense by throwing the burden of defraying the same on the parties by whom it has been caused, whether such parties are or not on the whole successful." Since the judgment pronounced by this Court on the 9th, Bramwell, B., has made the following indorsement on the petition: "I determine the election to be void. I order that all costs, charges, and expenses of and incidental to the presentation of the petition, and to the proceedings consequent thereon, except as in the statute in that behalf excepted, be defrayed by the parties who have respectively incurred the same."

[BOVILL, C.J. That applies to all the costs. And it is most material that the discretion as to costs should be exercised by the judge who, having tried the petition, knows all the circumstances of the case.]

That course was adopted in the *Youghal Case* (2), where O'Brien, J., who tried the petition, having declined to order the respondent to pay the general costs of the proceedings, directed that he should pay the petitioner's costs of the argument of the special case.

BOVILL, C.J. I think the order of my Brother Bramwell indorsed on the petition carries the costs of the special case. He

(1) 31 & 32 Vict. c. 125, ss. 24, 30, 34.

(2) Ir. Law Rep. 3 C. L. 530; 1 O'M. & H. 291, 299.

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was the proper person to exercise his discretion in the matter; and he has done so.

KEATING and MONTAGUE SMITH, JJ., concurred.

BRETT, J. The costs of the special case are clearly, within the language of the learned Baron's indorsement, "costs of and incidental to the presentation of the petition and to the proceedings consequent thereon."

Judgment accordingly.

Agent for petitioner: *T. Gilbert.*
Agents for respondent: *Wyatt & Hoskins.*

June 10.

POTTER AND OTHERS *v.* RANKIN.

Taxation of Costs—Discretion of Master—Subsistence Money for Witnesses detained to give Evidence.

In an action upon a policy of insurance, the master, on taxation of the plaintiffs' costs, allowed subsistence-money for the captain (whose conduct was impugned by the defendant, and whose personal attendance at the trial was therefore admitted to be necessary) from the issuing of the writ until the trial, a period of eighteen months, at the rate of 10s. a day; the trial having been delayed by the necessity for each party sending out a commission to examine witnesses at the place where the disaster occurred:—

Held, that, in the absence of anything to shew that the master had exercised an improper discretion either as to the amount or the period of the allowance, the Court could not interfere.

ACTION on a policy on the ship *Sir William Eyre*, on freight from Calcutta to London. The writ of summons issued on the 21st of March, 1865. Issue was joined on the 27th of June in the same year; and on the 1st of July a summons was taken out for a commission to examine witnesses at Calcutta, and the short order was made on the 5th. In consequence of difficulties in settling the extended order and in preparing the interrogatories and cross-interrogatories, the commission was not sent out to Calcutta until the 10th of January, 1866. It was returned early in May.

On the 6th of December, 1865, the defendant's attorneys obtained an order for a commission to examine witnesses at Otago, in

New Zealand, the trial to be postponed until the return thereof. This commission was returned to London in October, 1866; and the cause was tried at the sittings in London after Michaelmas Term following, when a verdict was found for the defendant, subject to leave reserved to the plaintiffs to move to enter the verdict for them. A rule nisi was obtained for that purpose, and afterwards discharged (1); but the judgment of the Common Pleas was reversed by the Exchequer Chamber. (2)

On taxation of the plaintiffs' costs, they claimed and the master allowed 211*l.* 3*s.* 4*d.* for detention of the captain of the *Sir William Eyre*, who was a material and necessary witness, and whose conduct during the voyage had been impugned by the defendant, from the issuing of the writ until the 2nd of February, 1866, for the sole purpose of giving evidence on the trial of this cause, and from that day until the 12th of December, 1866, for the purpose of giving evidence in this and two other causes of *Potter* v. *Campbell* and *Wingate* v. *James* arising out of the same voyage,—being at the rate of 10*s.* per day for subsistence-money and detention, and 1*l.* 13*s.* 4*d.* for travelling expenses, after deducting the proportion chargeable in respect of the two other actions. An application was made to Bramwell, B., at chambers, for a review of the taxation; but the learned Baron referred the matter to the Court.

Cohen, in Easter Term, obtained a rule nisi, on the ground that the allowance was excessive.

Sir G. Honyman, Q.C., shewed cause. The principle upon which the allowance for detention of a material witness is based will hardly be disputed; and the amount is for the master's discretion. One of the earliest cases on the subject is *Lonergan* v. *Royal Exchange Assurance* (3), where, the prothonotary having refused to allow for the expenses and loss of time of the captain of the vessel on his voyage from the Havannah to this country, his detention here, and return, the Court ordered a review. In the subsequent case of *Mount* v. *Larkins* (4) the claim was allowed. In *Evans* v. *Watson* (5), subsistence-money was allowed for the

(1) Law Rep. 3 C. P. 562.
(2) Antè, p. 341.
(3) 7 Bing. 725. See *Berry* v. *Pratt*, 1 B. & C. 276.
(4) 8 Bing. 195. And see *Temperley* v. *Scott*, 8 Bing. 392.
(5) 3 C. B. 327.

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captain (whose conduct it was intended to impugn) during a detention of 300 days. The rule was extended to the case of the plaintiff himself, his testimony being in the opinion of the master material and necessary, in *Howes* v. *Barber* (1), *Ansett* v. *Marshall* (2), and *Dowdell* v. *Australian Royal Mail Steam-Navigation Co.* (3) In all these cases the allowance was about the same as here. In the last case upon this subject, *Calvert* v. *Scinde Ry. Co.* (4), this Court refused to direct the master to review his taxation, where he had allowed the plaintiff, an engineer of an Indian railway company, in an action brought by him against the company for a wrongful dismissal,—the company having consented to a verdict for 200*l.* for a quarter's salary and 150*l.* for the plaintiff's passage to England to attend the trial,—subsistence-money at the rate of 300*l.* a year during his stay in England (a year and a half), and 150*l.* for his passage back to India. (5) If this were a matter which came before the Court for the first time, the allowance here made by the master could hardly be said to be unreasonable; and it is abundantly warranted by the authorities. Seeing the hazardous occupation of the witness, it was not unreasonable to keep him.

Cohen, in support of the rule. It must be conceded that the evidence of the captain in this case was most material on both sides. The plaintiffs' attorneys, however, must have known that the cause could not be tried for a very long period, and therefore it was unreasonable that the captain should be prevented from obtaining other employment in the interim; or, his examination might have been taken de bene esse. There is no allegation that he was not so employed.

[MONTAGUE SMITH, J. Except the affidavit that he was detained all the time here for the purpose of giving evidence. If he had in fact been employed on another voyage, that might have been shewn before the master.]

BOVILL, C.J. A very large sum has undoubtedly been allowed for detention and subsistence-money for the witness; and I agree

(1) 18 Q. B. 588; 21 L. J. (Q.B.) 254.
(2) 22 L. J. (Q.B.) 118.
(3) 3 E. & B. 902; 23 L. J. (Q.B.) 369.
(4) 18 C. B. (N. S.) 306.
(5) In *Stewart* v. *Steele* (4 M. & G. 669), the allowance was at the rate of a guinea per day.

that it is the duty of the master to watch most jealously and exercise the most scrupulous care in dealing with such a claim. At the same time I must observe that, without having all the facts and the briefs before us, it is extremely difficult for us to determine whether or not the master has exercised a proper discretion and judgment in making the allowance; and it lies on the defendant, who seeks to impeach his decision, to satisfy us that he has done wrong. I confess I feel some hesitation in coming to the conclusion that it was proper to allow so large a sum as has been allowed here, because, from the nature of the cause, it must have been in the contemplation of the parties that a very long period must necessarily elapse before the trial could take place. The captain might have been examined and cross-examined before the master, and so sufficient evidence might have been got out to satisfy both sides, and the witness might have been allowed to depart on another voyage, and still his testimony might have been had at the trial. At the same time, it must be borne in mind that the case was one of very considerable importance in its character as well as with reference to the amount at stake; and, the conduct of the captain being involved in the issue, I cannot take upon myself to say that the master was wrong in the view he took. It was certainly material to the case of either party that the examination and cross-examination of the captain should be had before the jury, and most essential to the ends of justice. My experience of the trial goes far to justify what the master has done. The importance of these questions between assured and underwriters, with reference frequently to matters arising in distant parts of the world, must necessarily occasion more than ordinary expense and delay, especially when it becomes necessary to send out commissions for the examination of witnesses. In this case the master, having all the circumstances before him, has exercised his discretion; and I am not prepared to say that the sum he has allowed for the necessary detention of the captain is extravagant or unreasonable. I therefore think the rule to review his taxation should be discharged with costs.

KEATING, J. I am of the same opinion. The question turns very much on the admitted necessity for the attendance of the

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captain to give evidence at the trial. The sum which the master has allowed on that account is undoubtedly large; but that arises from the particular circumstances of the case, and the unavoidable delay in proceeding to trial occasioned by each party sending out a commission to examine witnesses, the one at Calcutta, the other at Otago. It is not the practice of the Court to interfere with the discretion of the master upon a matter which is strictly within his jurisdiction, unless satisfied that it has been erroneously or improperly exercised. I am not satisfied that that is so here, and therefore I agree that the rule should be discharged.

MONTAGUE SMITH, J. In the cases cited the courts have clearly sanctioned the allowance of subsistence-money for witnesses detained in this country for the purpose of giving evidence, leaving it to the master to determine whether or not the witnesses ought to have been kept, and whether the period of detention was reasonable, regard being had to all the circumstances of the case. I do not for a moment question the propriety of the exercise of the master's discretion in this case in so far as he held it to be reasonable and proper to detain the witness; but I have entertained some doubt whether he was not kept an unreasonable time. From the nature of the case, it must have been obvious from the commencement that the trial could not take place for at least fifteen or eighteen months. It certainly was possible that the captain might have been employed in his calling during some portion of that time. That, however, was for the master, and I must suppose that he did inquire into it. It certainly does appear that the second commission could not have been in the contemplation of the plaintiffs when the writ issued, or even when issue was joined. The necessity for it seems to have sprung up afterwards. Although I entertain some doubt whether the allowance has not been too liberal, I cannot bring myself to say that the master has improperly exercised his discretion. This extra expenditure certainly requires to be watched very narrowly. It seems startling to keep a witness so long on demurrage at so great a cost. It can only be justified under very peculiar circumstances. Not being satisfied that a wrong discretion has been exercised on this occasion, I concur in the discharge of the rule.

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BRETT, J. It is not suggested that the master has violated any principle of law or any rule of practice. The complaint is that he has not properly exercised his discretion in the amount of the allowance he has made. If I could be satisfied that he had so exercised his discretion as to produce injustice or throw an unreasonable burthen upon the defendant, I should have been disposed to interfere. But I am not satisfied that he has done so. The captain was a witness whose attendance at the trial was material to the interest of both parties; and, he being a person who was usually employed on long voyages, the only way to secure his attendance was to keep him here. I cannot say that this was a case the trial of which the plaintiffs were bound to assume could not take place for eighteen months. If the surveys had been admitted (as is usually done), it might have been tried much earlier. I cannot see the time when it would have been proper and safe to allow the captain to absent himself: nor do I see that any injustice has been done.

Rule discharged, with costs.

Attorneys for plaintiffs: *Thomas & Hollams.*
Attorneys for defendant: *Field, Roscoe, & Co.*

BOVILL AND ANOTHER *v.* FINCH.

June 14.

Patent Law—Prolongation of Time of Patent—English and Scotch Patents—Patent Law Amendment Act, 1852—15 & 16 *Vict. c.* 83—16 & 17 *Vict. c.* 115—*Letters Patent.*

Separate patents were granted for an invention in England, Scotland, and Ireland, previous to the passing of the Patent Law Amendment Act, 1852 (15 & 16 Vict. c. 83), for terms expiring at the same date. By that Act, and its amending Act, 16 & 17 Vict. c. 115, it was provided that the letters patent granted for the prolongation of a patent should for the future be sealed with the great seal of the United Kingdom, and should be of force in the whole of the United Kingdom.

Letters patent were subsequently granted, sealed with the great seal of the United Kingdom, prolonging for a term of five years from their expiration the privileges granted by the three patents above mentioned:—

Held, that the effect was the same as if the three patents had been separately prolonged, and that the fact of one of the original patents being void for want of novelty would not prevent the letters patent being valid as a prolongation of the other patents.

DECLARATION. That George Hinton Bovill was the first and true inventor of a certain new manufacture; that is to say, improve-

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ments in manufacturing wheat and other grain to meal and flour, as the same was described in the specification amended by disclaimer and memorandum of alteration thereinafter mentioned, and thereupon Her Majesty Queen Victoria by her letters patent, under the Great Seal of the United Kingdom of Great Britain and Ireland, granted to Bovill, his executors, administrators, and assigns, the sole privilege to make, use, exercise, and vend the said invention within England, Wales, and the town of Berwick-on-Tweed, for the term of fourteen years from the 5th of June, 1849, subject to a condition that Bovill should, within six calendar months next after the date of the letters patent, cause to be enrolled in Her Majesty's High Court of Chancery an instrument in writing, under his hand and seal, particularly describing and ascertaining the nature of the invention, and in what manner the same was to be performed, and Bovill duly complied with and fulfilled the condition within the time prescribed, and during the said term Bovill did duly petition for and obtain a further extension of the term of fourteen years for which the letters patent were granted; that is to say, for an extended term of five years from the expiration of the original term, and Bovill obtained a grant of Her Majesty's new letters patent for his said invention for the said extended term as aforesaid; and after the passing of an Act of Parliament passed in the 5th and 6th years of the reign of his late Majesty King William IV., to amend the law of and touching letters patent for inventions, and of the Patent Law Amendment Act, 1852. Bovill, pursuant to the said statutes, and by and with the leave of her present Majesty's Attorney General first had and obtained for that purpose, and duly certified by his fiat and signature in that behalf entered and filed according to the statutes in that case made and provided a disclaimer and memorandum of alteration in writing of part of the said specification, and the reasons for such disclaimer and memorandum of alteration, the same being under the hand and seal of Bovill, and not being such disclaimer or such alteration as extended the exclusive right granted by the letters patent; and the disclaimer and memorandum of alteration were afterwards duly filed with the specification to which the same related, pursuant to the statutes in that case made and provided; and the defendant, during the term of the said letters patent

granted for the original term, and also during the extended term and after the disclaimer and memorandum of alteration were so entered and filed as aforesaid, did, by the use of the invention at the defendant's mill or mills, situate at Millbank or elsewhere in England, infringe the letters patent and the sole privilege thereby respectively granted to Bovill.

The 9th plea set out in full the specification of the patent and the disclaimer.

The 14th plea, which was pleaded only to the alleged infringements of the prolongation of the patent, set out letters patent granting a prolongation for five years of the then patents for England, Scotland, and Ireland, and averred that before and at the time of granting them the letters patent for Scotland, so prolonged, were and always had been void by the law of Scotland, by reason of public user and publication in Scotland of the alleged invention before the grant of the letters patent for Scotland.

The 15th plea was similar, but alleged that the Scotch patent was void on account of a prior user in England.

Demurrers to the 9th, 14th, and 15th pleas, and joinders in demurrer.

The arguments and judgment on the demurrer to the 9th plea, depending upon the special words of the specification, are omitted.

Grove, Q.C. (*T. Aston,* and *J. C. Mathew,* with him), for the plaintiffs. The question raised by the demurrer to the 14th plea is whether the letters patent, granted in prolongation of the three original patents for England, Scotland, and Ireland, are entirely void even as to England if one of the original patents, viz., that as to Scotland was invalid. This question has never been decided, though it was discussed in the Privy Counil in the case of this very patent, reported as *In re Bovill's Patent.* (1) Previously to the Patent Law Amendment Act, 1852 (15 & 16 Vict. c. 83), the three original patents would have been separately prolonged by distinct letters patent, but under that Act letters patent under the great seal of the United Kingdom are to have effect throughout Scotland and Ireland as well as England. This, however, was only intended

(1) 1 Moo. P. C. (N. S.) 348.

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to alter the form under which the patents were to be granted, and not the rights arising out of them; and the new grant, though one document, is still in effect equivalent to three distinct letters patent. Its invalidity, therefore, as to one of the three kingdoms, will not affect its validity as to the others. This appears, by inference, from the 18th section (1) of this Act, which, while providing that the patent may extend to the colonies, evidently contemplates that in that case it may be invalid as to one of them, though in force elsewhere; and so, too, the expression is used in the 40th section (1), that such new letters patent shall extend to and be available as and for such places as the original letters patent extended to and were available in, which clearly contemplates a case like the present, where the prolongation extends to the whole of the United Kingdom, but is of force only in the places where the former patents were of force.

There could not have been distinct grants for the three kingdoms, though perhaps the grant might have been confined to any one of them; this appears from 16 & 17 Vict. c. 115, s. 7 (1), and also

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(1) 15 & 16 Vict. c. 83, s. 18:—"The commissioners, so soon after the sealing of the said warrant as required by the applicant for the letters patent, shall cause to be prepared letters patent for the invention, according to the tenor of the said warrant; and it shall be lawful for the Lord Chancellor to cause such letters patent to be sealed with the great seal of the United Kingdom; and such letters patent, so sealed, shall extend to the whole of the United Kingdom of Great Britain and Ireland, the Channel Islands, and the Isle of Man; and, in case such warrant so direct, such letters patent shall be made applicable to Her Majesty's colonies and plantations abroad, or such of them as may be mentioned in such warrant; and such letters patent shall be valid and effectual as to the whole of such United Kingdom, and the said islands and isle, and the said colonies or plantations, or such of them as aforesaid, and shall confer the like powers, rights, and privileges as might, in case this Act had not been passed, have been conferred by several letters patent of the like purport and effect passed under the great seal of the United Kingdom under the seal appointed to be used instead of the great seal of Scotland and under the great seal of Ireland respectively, and made applicable to England, the dominion of Wales, the town of Berwick-upon-Tweed, the Channel Islands, and Isle of Man, and the said colonies and plantations, or such of them as aforesaid, to Scotland and to Ireland respectively, save as herein otherwise provided: Provided always, that nothing in this Act contained shall be deemed or taken to give any effect or operation to any letters patent to be granted under the authority of this Act in any colony in which such or the like letters patent would be invalid by the law in force in the same colony for the time being: Provided always, that a transcript of such letters

from s. 53 of the previous Act (15 & 16 Vict. c. 83), which was re-enacted in 16 Vict. c. 5, s. 4, and which, while providing for the stamps payable on grants to each kingdom separately, confines them to cases where the application for the patent had been made before the Patent Law Amendment Act, 1852.

The fact that the three grants are included in one patent does not necessarily prevent one grant being bad and the other good. In the case of several inventions being included in one patent, the invalidity of one indeed vitiates the whole, but that is because they are always treated by the letters patent as one invention. If the Crown can be shewn to have been deceived too, the letters patent will be held void altogether, but there must be a deception by the patentee; it is not enough that some mistake with reference to the subject-matter of the letters patent should be subsequently discovered. It may be doubtful what would be the effect if a new grant extending to the whole kingdom were invalid as to part, but this is in effect only a prolongation of the old patents, and even if it be treated as a fresh grant and not only a modification of the

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shall, as soon after the sealing of the same, and in such manner as the commissioners shall direct, be transmitted to the Director of Chancery in Scotland, and be recorded in the records of Chancery in Scotland, upon payment of such fees as the commissioners shall appoint, in the same manner, and to the same effect in all respects, as letters patent passing under the seal appointed by the treaty of union to be used in place of the great seal of Scotland have heretofore been recorded; and extracts from the said records shall be furnished to all parties requiring the same, on payment of such fees as the commissioners shall direct, and shall be received in evidence in all courts in Scotland to the like effect as the letters patent themselves."

s. 40:—"All the provisions of the said Act 5 & 6 Wm. 4, c. 83, for the confirmation of any letters patent, and the grant of new letters patent, and all the provisions of the said Act, and of the Acts 2 & 3 Vict. c. 67, and 7 & 8 Vict. c. 69, respectively, relating to the prolongation of the term of letters patent, and to the grant of new letters patent for a further term, shall extend and apply to any letters patent granted under the provisions of this Act; and it shall be lawful for Her Majesty to grant any new letters patent, as in the said Acts mentioned; and in the granting of any such new letters patent Her Majesty's order in council shall be a sufficient warrant and authority for the sealing of any new letters patent, and for the insertion in such new letters patent of any restrictions, conditions, and provisions in the said order mentioned; and the Lord Chancellor, on the receipt of the said order in council, shall cause letters patent, according to the tenor and effect of such order, to be made and sealed in the manner herein directed for letters patent issued under the war-

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original one, it must be considered divisible as above shewn as the original patents were distinct.

Watkin Williams (*Fullarton* with him), for the defendant. The letters patent, whose validity the defendant disputes, profess to grant to the plaintiffs a monopoly of their invention throughout the United Kingdom. If that cannot take full effect the letters patent are entirely void, because it is assumed that if the Crown grant what is beyond its power, it must have been deceived, since the Crown can do no wrong. The cases on the subject are collected in *The Case of Alton Woods* (1), from which it appears that it does not depend upon there having been any actual fraud on the part of the patentee, but that a grant from the Crown must take effect entirely, or not at all. It is upon this ground that a patent for three inventions is held void as regards the whole, if any of them is not the subject of a patent. So, in *Morgan* v. *Seaward* (2), Parke, B., said: "That a false suggestion of the grantee avoids an ordinary grant of lands or tenements from the Crown is a maxim of the Common Law, and such a grant is void, not against the Crown

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rant of the law officer: Provided always, that such new letters patent shall extend to, and be available in and for, such places as the original letters patent extended to and were available in: Provided also, that such new letters patent shall be sealed and bear date as of the day after the expiration of the term of the original letters patent which may first expire."

By 16 & 17 Vict. c. 115, s. 7, after reciting that doubts have arisen whether the provisions of the Patent Law Amendment Act, 1852, for the making and sealing new letters patent for a further term, pursuant to Her Majesty's order in council, in the cases mentioned in s. 40 of the said Act, extends to the making and sealing of new letters patent, in the manner by such Act directed, where such new letters patent are granted by way of prolongation of the term of letters patent issued before the commencement of the said Act; and that it is expedient that such new letters patent, granted by way of prolongation, should be granted according to the provisions of the said Patent Law Amendment Act, it is declared and enacted, that "where Her Majesty's order of council for the sealing of new letters patent shall have been made after the commencement of the said Act, the said provisions of the said Act for making and sealing, in manner aforesaid, of new letters patent shall extend, and shall, as from the commencement of the said Act, be deemed to have extended, to the making and sealing, in manner aforesaid, of new letters patent for a further term, as well where the original letters patent were made before as where such original letters patent have been issued since the commencement of the said Act."

(1) 1 Co. Rep. 43 b.

(2) 2 M. & W. 544, 561.

merely, but in a suit against a third person: *Travell* v. *Carteret* (1), *Alcock* v. *Cooke*. (2) It is on the same principle that a patent for two or more inventions, when one is not new, is void all together, as was held in *Hill* v. *Thompson* (3), and *Brunton* v. *Hawkes* (4), for although the statute invalidates a patent for want of novelty, and consequently by force of the statute the patent would be void so far as related to that which was old, yet the principle on which the patent has been held to be void altogether, is that the consideration for the grant is the novelty of all, and the consideration failing, or, in other words, the Crown being deceived in its grant, the patent is void and no action maintainable upon it." And in *Lord Lovell's Case*, quoted in *The Case of Alton Woods* (5), it was decided that the grant in that case by the king to one and his heirs male was void, though it would not have been so if the grant had been made by a private person. The case of *Alcock* v. *Cooke* (2) is another authority to the same effect.

Some confusion has been introduced into this case from the practice having formerly obtained of granting separate patents for the three kingdoms; the king could grant a monopoly for any limited space, as London or York, though in practice that has not been usual; but it is upon the same principle that patents limited to one kingdom have been granted, and they could only be good if the invention was new, within the realm, and had not been used at all in the United Kingdom, so that the king could have granted the monopoly, if he had chosen, for the whole kingdom. This was, in effect, the decision of the House of Lords in *Brown* v. *Annandale* (6), in which it was held that though the realm, at the time of passing the Act of Monopolies, was confined to England, the effect of the Union was to extend it at least to Scotland and Ireland, and it would seem that it includes the colonies also. The Crown can still grant a patent for either kingdom separately, but can only grant a prolongation in respect of the country to which the original patent extended, for the power of the Crown to prolong the patent at all is entirely due to the provisions of 5 & 6 Wm. 4,

(1) 3 Lev. 134.
(2) 5 Bing. 340.
(3) 8 Taunt. 375.
(4) 4 B. & A. 541.
(5) 1 Co. Rep. 43 b.
(6) 8 Cl. & F. 437.

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c. 53, s. 4, and the power is expressly limited to the prolonging the patent to the same extent in which it originally existed. If the patentee obtains a grant by way of prolongation of larger extent than that which previously existed, he loses all by having grasped at too much. The consideration for the grant of the prolongation as to the whole is the state of circumstances existing in relation to all the old patents; it may well be that the Privy Council would not have recommended the prolongation at all, but for some facts connected with the Scotch patent which had existed a shorter time than the English; and if they had known that the Scotch patent was bad, all that ground for their recommendation would have been taken away. There is no reason why the Crown should not still grant separate patents for each kingdom, and this was done in *Heath's Case* (1), the most ample powers of granting letters patent, as before, being reserved to the Crown by ss. 15, 16, and 17 of the Patent Law Amendment Act, 1852. The effect of s. 18 (2) is not to make the grant necessarily extend to all the countries, but to make a patent extending to all the countries good. The 40th section (3) only restricts the power of granting a prolongation of a monopoly to the grant of it in the same country to which it originally extended.

Grove, Q.C., in reply. It is clear, that if separate prolongations had been granted of the three patents, as would have been the case before the Patent Law Amendment Act, 1852, one of them might have been bad and the others valid, and since that Act only affects the mode of granting the patents and not the law respecting them, the same must be the case still. The one patent is to be treated as if it was three, and this is confirmed by s. 35 of the Act which allows the parts of the letters patent relating to Scotland and Ireland to be transferred separately, and when they have been so they are in effect, if not in form, three distinct patents.

The Case of Alton Towers (4) and the cases there cited, do not shew that if there is a grant of several things, and one is void, the others will necessarily be void; it depends upon whether the matters are separable. In a note, at p. 41, it is said, "That if the king is not deceived by the false suggestions of the party, but only

(1) 8 Moo. P. C. 217.
(2) Ante, p. 526, n.
(3) Ante, p. 527.
(4) 1 Co. Rep. 43 b.

mistaken in his own surmises, this will not vitiate the grant;" and "that though the king mistakes either in matter of law or fact, yet, if this is not any part of the consideration of the grant, it will not vitiate it." In *Alcock* v. *Cooke* (1) the patent was void, because the Crown had no power to grant what it had purported to grant.

Cur. adv. vult.

The judgment of the Court (Keating, Montague Smith, and Brett, JJ.) was delivered by

MONTAGUE SMITH, J. In this case the plaintiffs demurred to the 9th, 14th, and 15th pleas; and the demurrers were argued in the last term before my Brothers Keating, Brett, and myself.

[After giving judgment on the 9th plea in favour of the plaintiffs, he proceeded]:—

The 14th plea set out the new letters patent granted to the plaintiff extending the term of the original letters patent. This plea, which is pleaded only to the alleged infringement of such new letters patent, avers that the original letters patent for Scotland were void according to the law of Scotland, by reason of public user and publication in Scotland of the inventor before the grant of the said letters patent for Scotland. The new letters patent set out in the plea recite the three separate original grants for England, Scotland, and Ireland respectively; and it thus appears that the original English letters patent were granted in June, 1849, and the Scotch and Irish in May, 1853. The plea does not aver that the public user in Scotland was before the date of the original English patent, nor does it in any way impeach the validity of that patent.

It must be taken, for the purpose of the demurrer, which, of course, admits the facts averred in the plea, that the original Scotch patent is bad for want of novelty; and the question raised is, whether the prolongation of the three original terms, which is contained in one and the same letters patent under the great seal of the United Kingdom, is void altogether as to all three countries, by reason of such prolongation being so contained in the same letters patent, or whether the grant is devisable, and may be sustained so far as it extends the term of the English patent.

(1) 5 Bing. 340.

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It was contended for the defendant that the invalidity of the original Scotch patent rendered the whole grant void, on the ground that the Crown was deceived as to part of the consideration for the grant.

It has, no doubt, been decided that letters patent are wholly void, where part of the invention claimed is not new, on the principle stated by Parke, B., in *Morgan* v. *Seaward* (1), viz., that "the consideration for the grant is the novelty of all; and, the consideration failing, or, in other words, the Crown being deceived in its grant, the patent is void." See also *Hill* v. *Thompson* (2); *Brunton* v. *Hawkes*. (3) The distinction between these decisions and the present case is, that in them the want of novelty in a part of the invention affected the grants throughout their whole territorial limit; whereas, in the present case, it only affects the grant so far as Scotland is concerned. We do not, however, deem it necessary to decide what would be the effect of the want of novelty in one kingdom in the case of an original grant for the three kingdoms under one seal, because we think this grant of an extended term in the three original patents is divisible. We think, notwithstanding that the new letters patent are in one instrument, they ought to be regarded as granting three separate prolongations of three distinct patents; and that, as a consequence, although the prolongation may be invalid as to the Scotch grant, by reason of the want of novelty in Scotland at the time of the original letters patent, it may be good as to the English grant; in other words, that the grant for each country may stand or fall by itself.

The 2 & 3 Vict. c. 67, s. 2, which enables the Crown to grant an additional term, speaks of it as a prolongation of the "term," and "a further extension of the term in the letters patent." Every new grant, therefore, is a graft only on the original grant, and has no existence apart from the parent grant.

Before the passing of the Act of the 15 & 16 Vict. c. 83, the extension of the terms in the three letters patent would, according to the then existing practice, have been made by three new and separate letters patent for England, Scotland, and Ireland respectively; and in such a case it could not, we think, have been contended that

(1) 2 M. & W. 544, 561. (2) 8 Taunt. 375.
(3) 4 B. & A. 540.

the invalidity of the original Scotch patent would have made void the extended letters patent for England.

The difficulty arises from the provisions of the Act of the 15 & 16 Vict. c. 83, and the practice under it. The 18th section of the Act makes it lawful for the Lord Chancellor to cause letters patent for an invention to be sealed with the great seal of the United Kingdom, and enacts that such letters patent, when so sealed, shall extend to the whole of the United Kingdom of Great Britain and Ireland, and shall confer the like powers, rights, and privileges as might (in case the Act had not passed) have been conferred by several letters patent. The object appears to have been to make one patent do the office of several so far as the instrument was concerned. But, even in the case of original patents, provision is made for the separate existence of the grant with reference to the different parts of the realm. Thus, the 35th section provides that the grantee of letters patent may assign the letters patent for England, Scotland, or Ireland respectively, as effectually as if the letters patent had been originally granted to extend to England or Scotland, or Ireland only; and that the assignee shall have and be subject to the like actions and suits as he would have had and been subject to upon the assignment of letters patent granted for England, Scotland, or Ireland, before the passing of the Act. It seems to us, from the language of this provision, that the legislature considered and treated the grants for England, Ireland, and Scotland, although in future they might technically be contained in one instrument under the great seal, as separate and separable grants in substance and operation. The provisions in ss. 15 and 35, relating to proceedings by scire facias shew the like intent.

It appears to have been doubted whether the provisions of the Act of the 15 & 16 Vict. extended to new grants by way of prolongation of former terms. The 7th section of the 16 & 17 Vict. c. 115 was passed to remove such doubts, and enacts that the provisions of the former Act shall apply to such new grants.

On consideration of the above Acts, and of the new letters patent granted to the plaintiff under them, for prolonging the terms of the three separate patents for England, Scotland, and Ireland, we come to the conclusion that the new letters patent, although in

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form one patent, are in substance and essence separate grants of prolongations of the three several terms of the original patents, as fully, for the purpose of the question raised on this demurrer, as if they had been contained in separate instruments; and, there being nothing to shew any want of novelty, or other failure of consideration for the prolongation of the term of the English patent, or that the Crown was deceived in any way as to that patent, we think the judgment on this demurrer should be for the plaintiffs.

It was admitted on the argument that the question raised by the demurrer to the 15th plea was the same as that on the 14th. The judgment on the demurrer, therefore, will also be for the plaintiffs.

Judgment for the plaintiffs.

Attorneys for plaintiffs: *Harrison, Beal, & Harrison.*
Attorney for defendant: *W. W. Wynne.*

June 28.

AUSTIN, APPELLANT; DOWLING, RESPONDENT.

County-Court—Jurisdiction under 9 & 10 *Vict. c.* 95, *s.* 58—*False Imprisonment —Malicious Prosecution.*

The defendant's wife having given the plaintiff into the custody of a constable on an unfounded charge of felony, the defendant attended at the police-station, and, after having been cautioned by the inspector on duty that he (the inspector) would not incur the responsibility of detaining the plaintiff unless the defendant distinctly charged him with felony and signed the charge-sheet, the defendant signed the charge-sheet, and the plaintiff was detained, and taken next morning before the magistrates, who upon the hearing discharged him.

The plaintiff took out a plaint in a county-court for false imprisonment, accompanying it with a notice whereby he expressly disclaimed any cause of action in respect of the malicious prosecution. The judge, erroneously treating the signing of the charge-sheet as the commencement of a "malicious prosecution," ruled that the whole was one continuous transaction, and that the false imprisonment could not be separated from the rest, and consequently that he had no jurisdiction: and he nonsuited the plaintiff:—

The Court, on appeal, directed a new trial.

APPEAL against a decision of the Judge of the Bristol county-court.

The particulars of demand annexed to the plaint-note were as follows:—

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"The plaintiff sues the defendant for that the defendant on Monday, the 13th of September, 1869, assaulted the plaintiff, and unlawfully and wrongfully and without reasonable or probable cause gave him into the custody of a policeman upon a false and unfounded charge of felony, to wit, feloniously breaking and entering into a bed-room at Manor House, in the occupation of the defendant, and caused him to be conveyed to a police-station in such custody, and then and there to be imprisoned for a long space of time, to wit, eighteen hours, whereby the plaintiff has been much damaged: and the plaintiff claims 50*l.*

"Take notice that the plaintiff expressly waives any right or cause of action whatsoever in this or any other court, for any slander, libel, or malicious prosecution, or other action in the nature of libel, slander, or malicious prosecution, arising out of or consequent upon or incident to the said assault and false imprisonment."

The plaintiff about eighteen months since came to lodge at the house of the defendant. In September, 1869, a considerable sum of money was due from the plaintiff to the defendant for board and lodging; and on the 9th of that month the plaintiff was served with a writ from the Court of Queen's Bench at the suit of the defendant for 90*l.* 8*s.* 4*d.*, and that amount and costs have been paid; but, on the 13th of September, when the plaintiff quitted the lodgings, there was due from him to the ~~plaintiff~~ defendant for board and lodging, a further sum of 3*l.* 15*s.*

On the 11th of September, the plaintiff found, on returning to his lodgings in the evening of that day, that the drawers in his bed-room had been emptied, and his private cupboards and the contents removed from his bed-room.

The plaintiff, on the 13th of September, went to the Clifton police-station, and requested the inspector of police to allow a constable to accompany him to the defendant's house, in order that he might possess himself of his property which had been removed as aforesaid, without a breach of the peace. A serjeant of police was sent by the inspector with the plaintiff. Upon the arrival of the plaintiff and the police-serjeant at the defendant's house, the plaintiff demanded his property of the defendant's wife, the defendant himself being absent, and was refused. The ~~defendant~~ plaintiff

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thereupon went upstairs,—the police-serjeant declining to accompany him,—and with his shoulder and a screw-driver broke open the door of a bed-room in the defendant's house, which was occupied by another lodger.

On his coming down stairs the defendant's wife, at the instance of the defendant's solicitor, gave the plaintiff in charge for felony, for breaking open the door; and the plaintiff was thereupon taken into custody by the police-serjeant, and walked with him to the Clifton police-station. After their arrival at the station, and when the nature of the charge and the circumstances out of which it arose were stated, the inspector of police disclaimed all responsibility in respect of the charge, and would not have acted or detained the plaintiff in custody unless the charge of felony had been distinctly made by or on the behalf of the defendant, who was then present, and unless the defendant had signed the charge-sheet, whereby the plaintiff was charged with "feloniously breaking and entering into a bed-room" in the defendant's house. The charge-sheet containing this allegation was accordingly signed by the defendant.

The defendant did not, nor did any one on his behalf, require that the plaintiff should be locked up; but, after the charge had been made and the charge-sheet signed by the defendant, the police, of their own motion, and in the usual course,—the case being one of alleged felony,—locked up the plaintiff, and refused to accept bail, as being beyond their competence, for the plaintiff's appearance before the magistrates on the following morning.

The plaintiff was then locked up through the night; and on the 14th of September he was brought before the magistrates by and in the custody of the police, upon the charge of felony; but, on the statement of the case on the part of the defendant, the magistrates dismissed the charge, and ordered the plaintiff to be and he was accordingly discharged. The plaintiff was in the custody of the police previously to the charge-sheet being signed by the defendant for about half an hour; and the residue of the plaintiff's imprisonment, being seventeen hours and a half, was subsequent to the signing of the charge-sheet.

The plaintiff's case being closed, the counsel for the de-

fendant, referring to the 58th section of 9 & 10 Vict. c. 95 (1), asked the judge to nonsuit the plaintiff, on the ground that the plaintiff's case was a case of malicious prosecution, and that, even if there was any evidence which would support an action for false imprisonment, the learned judge could not properly sever the evidence that supported an action for false imprisonment from the evidence which supported a case for malicious prosecution.

The judge, after hearing the counsel for the plaintiff, nonsuited the plaintiff, upon the ground that the evidence which had been produced disclosed and supported a case of malicious prosecution, and held that he therefore had no jurisdiction. He also ruled that, although there was evidence in support of a case of false imprisonment, inasmuch as the plaintiff was given into the custody of the serjeant of police by the defendant's wife, and so continued in the custody of the police up to the time when the charge-sheet was signed by the defendant; yet that he ought not, having regard to the particulars of demand, and as the jury had heard all the evidence, and as the imprisonment before and the imprisonment after the charge-sheet was signed were substantially parts of one and the same continuous transaction, to sever the evidence which supported a case of false imprisonment from the evidence which supported a case of malicious prosecution.

The grounds of appeal were: 1. That the judge was wrong in point of law in holding that he had no jurisdiction to hear or try the cause; but that, on the contrary, he had cognizance thereof wholly or in part, as being in fact and in law an action for false imprisonment: 2. That the judge was wrong in point of law in withdrawing the case from the consideration of the jury and ordering a nonsuit to be entered.

J. F. Norris, for the appellant. This was essentially a case of false imprisonment, and not of malicious prosecution. The distinction between the two descriptions of action is well pointed out

(1) The proviso in that section is as follows:—"Provided always that the Court shall not have cognizance of any action of ejectment, or in which the title to any corporeal or incorporeal hereditaments, or to any toll, fair, market, or franchise shall be in question, or in which the validity of any devise, bequest, or limitation under any will or settlement may be disputed, or for any malicious prosecution, or for any libel or slander, or for criminal conversation, or for seduction, or breach of promise of marriage."

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in the opinions of Lords Mansfield and Loughborough in *Johnstone* v. *Sutton*. (1)

[WILLES, J., referred to *Grinham* v. *Willey* (2), where the mere act of signing the charge-sheet at the request of the constable was held not sufficient to render the defendant liable for a false imprisonment or malicious prosecution.]

The plaint here was for false imprisonment only: *Chivers* v. *Savage* (3); *Brandt* v. *Craddock* (4); and the judge ought not to have received evidence of malicious prosecution. In *Jones* v. *Currey* (5), the plaint involved a charge of malicious prosecution.

Arundel Rogers, for the respondent. It is not competent to the judge of the county-court to try an action for malicious prosecution: 9 & 10 Vict. c. 96, s. 58: nor was it competent to the plaintiff to waive a part of his cause of action so as to give the court jurisdiction. It was upon this principle that the Court of Exchequer in *Hunt* v. *North Staffordshire Ry. Co.* (6) held that a prohibition was properly issued to restrain a county-court from proceeding on a plaint for the recovery of the costs of a defence before magistrates on a summons for an alleged offence against the bye-laws of a railway company,—it being in substance a plaint for a malicious prosecution.

[WILLES, J. There can be no malicious prosecution until the parties come before a Court or a judicial officer. In the case last cited the man never was in custody at all; it was malicious prosecution or nothing.]

Signing the charge-sheet was the commencement of a malicious prosecution. At all events, the attendance before the magistrates to support the charge was. And as soon as the evidence which would sustain the charge of malicious prosecution came out, the judge properly nonsuited the plaintiff.

Norris was not called upon to reply.

WILLES, J. It is clear that there was some evidence of a false imprisonment,—an imprisonment without justification. The defendant's wife took it into her head that she had a right to give

(1) 1 T. R. 493, 544.
(2) 4 H. & N. 496; 28 L. J. (Ex.) 242.
(3) 5 E. & B. 697; 25 L. J. (Q.B.) 85.
(4) 27 L. J. (Ex.) 314.
(5) 20 L. J. (Q.B.) 438.
(6) 2 H. & N. 451; 26 L. J. (Ex.) 374.

2 Jur. N. S. 137.

the plaintiff into custody because he broke into a room in the house in order to re-possess himself of his own property. In this she was mistaken; for, the plaintiff was guilty of nothing felonious or malicious. In *Patrick* v. *Colerick* (1), it was held that a plea to a declaration in trespass for breaking and entering the plaintiff's close, that the defendant, being possessed of certain goods of the plaintiff, without his leave and against his will took the goods and placed them on the close in the declaration mentioned, wherefore the defendant made fresh pursuit, and entered to re-take the goods, was a good plea and a good justification of the entry on the plaintiff's close. The plaintiff, having been so wrongfully given into the custody of a police-constable, was taken to the police-station. But for the subsequent act of the defendant, the plaintiff would not have been detained there. If the defendant had merely signed the charge-sheet, that, according to *Grinham* v. *Willey* (2), would not have amounted to more than making a charge against one already in the custody of a minister of the law who intended to keep him there. But it is found in the case that, though the defendant gave no express direction for the plaintiff's detention, he was expressly told by the inspector on duty that he (the inspector) disclaimed all responsibility in respect of the charge, and that he would have nothing to do with the detention of the plaintiff except on the responsibility of the defendant; and that the inspector would not have kept the plaintiff in custody unless the charge of felony was distinctly made by the defendant. Signing the charge-sheet with that knowledge, therefore, was the doing of an act which caused the plaintiff to be kept in custody. In *West* v. *Smallwood* (3), the defendant having accompanied the constable charged with the execution of a warrant against the plaintiff, and pointed out to him the person to be arrested, this was held to be evidence to go to the jury of a participation in the arrest. The judge of the county-court, therefore, was right in holding that there was evidence in support of a case of false imprisonment. How long did that state of false imprisonment last? So long, of course, as the plaintiff remained in the custody of a ministerial officer of the law, whose duty it was to detain him until he could be brought

(1) 3 M. & W. 483. (2) 4 H. & N. 496; 28 L. J. (Ex.) 242.
(3) 3 M. & W. 418.

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before a judicial officer. Until he was so brought before the judicial officer, there was no malicious prosecution. The distinction between false imprisonment and malicious prosecution is well illustrated by the case where, parties being before a magistrate, one makes a charge against another, whereupon the magistrate orders the person charged to be taken into custody and detained until the matter can be investigated. The party making the charge is not liable to an action for false imprisonment, because he does not set a ministerial officer in motion, but a judicial officer. The opinion and judgment of a judicial officer are interposed between the charge and the imprisonment. There is, therefore, at once a line drawn between the end of the imprisonment by the ministerial officer and the commencement of the proceedings before the judicial officer. It is fallacious to inquire whether or not the one is severable from the other, until you find some inseparable connection between them. It may very well happen in the superior courts, which have jurisdiction over both descriptions of action, where the plaintiff, having been at once taken before a magistrate, may be content to bring his action for false imprisonment only. In such a case,—which must be within the memory of all of us,—the judge would tell the jury to give damages for the false imprisonment only, and not for what came under the cognizance of the magistrate. What did the judge do here? He ruled that, although there was evidence in support of a case of false imprisonment, yet that he ought not, having regard to the particulars of demand, and as the jury had heard all the evidence, and as the imprisonment before and the imprisonment after the charge-sheet was signed were substantially parts of the same continuous transaction, to sever the evidence which supported a case of false imprisonment from the evidence which supported a case of malicious prosecution. The former part of the ruling is quite right: the latter part is wrong in two particulars: in the first place, the judge seems to have thought that there was an inception of the malicious prosecution at the time the charge-sheet was signed; and, in the second place, that the false imprisonment merged in that. But, for the reasons already assigned, it was false imprisonment all through, so long as the matter remained in the hands of the ministerial officer. If it were a ground of nonsuit that, either for want

of care on the part of the judge, or the absence of objection on the part of counsel, evidence is let in of a matter which is beyond the jurisdiction of the county-court judge, the number of nonsuits would be greatly increased. The proper course in such a case is, to warn the jury to exclude such evidence from their minds in considering the question of damages. There having been no contingent assessment of damages here, all we can do is to set aside the nonsuit and direct a new trial, with costs.

KEATING, J., concurred.

MONTAGUE SMITH, J. I am of the same opinion. The plaint was clearly for false imprisonment only; and the notice which accompanied it did not change its character; on the contrary, it was a distinct disclaimer of any intention to go for damages for a malicious prosecution. There being, then, nothing on the face of the plaint to shew an absence of jurisdiction, I think the judge was wrong in nonsuiting the plaintiff because some evidence got in which might have supported an action for malicious prosecution. Upon the plaint, and upon the evidence, the county-court clearly had jurisdiction. The case of *Hunt* v. *North Staffordshire Ry. Co.* (1) is clearly distinguishable. The plaint there was for the recovery of costs of defence and loss of time incurred in the defence of an unfounded charge before magistrates. My Brother Martin there says: "The only action that could be maintained by the plaintiff is for a malicious prosecution:" and my Brother Bramwell adds: "The plaint was either a plaint for malicious prosecution, or nothing."

Judgment accordingly.

Attorney for appellant: *J. J. Darley.*

Attorneys for respondent: *Stocken & Jupp, for M. T. Alman, Bristol.*

(1) 2 H. & N. 451; 26 L. J. (Ex.) 374.

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July 11.

JACKSON *v.* SPITTALL.

Practice—Common Law Procedure Act, 1852 (15 & 16 *Vict. c.* 76), *s.* 18—*Writ for Service abroad—"Cause of Action"—Setting aside Writ.*

It is competent to a defendant served with a writ of summons, under s. 18 of the Common Law Procedure Act, 1852, to apply to a judge to set aside the writ, on the ground that the cause of action did not arise within the jurisdiction of the Court, before the plaintiff obtains leave to proceed.

"Cause of action" in that section does not mean the *whole* cause of action, i.e. contract and breach; but the act on the part of the defendant which gives the plaintiff his cause of complaint.

ACTION to recover damages for the alleged breach of an undertaking by the defendant, in consideration of the plaintiff's handing over and indorsing to him, at the request of one Drinkwater, and to be held by the defendant as collateral security only for a debt due to him from Drinkwater, a bill of exchange for 1000*l.* drawn by the plaintiff upon and accepted by the Glen Aulden Slate and Slab Quarry Company, which bill the plaintiff held as trustee for Drinkwater, and by which undertaking the defendant engaged that he would not part with the bill, but would hold the same without recourse to the plaintiff. The alleged breach was that the defendant indorsed and negotiated the bill in Manchester, whereby the plaintiff was compelled to pay the amount with costs to a bonâ fide indorsee for value.

A writ of summons under s. 18 of the Common Law Procedure Act, 1852, having been served upon the defendant in the Isle of Man, the defendant took out a summons before Master Benett to set aside the writ, upon the ground that the cause of action, if any, arose only in the Isle of Man. This was opposed by the plaintiff on an affidavit that the breach took place in Manchester. It was contended by the defendant, upon the authority of *Diamond* v. *Sutton* (1) and *Allhusen* v. *Malgarejo* (2), that the whole cause of action must arise within the jurisdiction of the superior Courts, to entitle the plaintiff to proceed. On the other hand it was contended that it was enough that a substantial part of the cause of action arose within the jurisdiction; and, further, that the application was premature. The master, in deference to the cases cited,

(1) Law Rep. 1 Ex. 130. (2) Law Rep. 3 Q. B. 340.

made an order to set aside the writ unless the defendant would undertake to prove at the trial a cause of action arising within the jurisdiction. On appeal to Bramwell, B., that learned judge ordered that so much of the order of Master Benett as directed that the writ should be set aside should be rescinded.

G. B. Hughes, in Easter Term, obtained a rule calling upon the defendant to shew cause why so much of the order of Master Benett as was not rescinded by the order of Bramwell, B., should not also be rescinded. The cases of *Fife* v. *Round* (1) and *Sichel* v. *Borch* (2) were cited.

May 11. *Bridge* shewed cause. Two questions arise here: first, whether the application to set aside the writ was premature; secondly, whether it was necessary that the judge (or master) should be satisfied that the *whole* cause of action arose within the jurisdiction; and this depends upon the construction to be put upon a few words of s. 18 of the Common Law Procedure Act, 1852, "upon being satisfied by affidavit that there is a cause of action which arose within the jurisdiction, or in respect of the breach of a contract made within the jurisdiction." The proper course, according to *Binet* v. *Picot* (3), would seem to be to apply to set aside the writ, and not to wait until the plaintiff applies for leave to proceed. It is true the point was not taken there; but it is obvious that that is the more convenient course to pursue, inasmuch as then affidavits on both sides would be before the Court or judge. The objection was taken in *Diamond* v. *Sutton* (4), but was not allowed to prevail, and a rule was made to set aside the writ unless the plaintiff would give an undertaking to prove a cause of action arising within the jurisdiction, and to confine himself to that cause.

[BRETT, J. The imposition of the condition assumes that the judge or master is not satisfied that there is a cause of action which arose within the jurisdiction. If he was satisfied of that fact, the master should not have imposed the condition; if he was not, he ought to have set aside the writ.]

(1) 6 W. R. 282.

(2) 2 H. & C. 954; 33 L. J. (Ex.) 179.

(3) 4 H. & N. 365; 28 L. J. (Ex.) 244.

(4) Law Rep. 1 Ex. 130.

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Secondly, the more important question here is, what is the meaning of "a cause of action." The words of the Act are, "a cause of action which arose within the jurisdiction," or "the breach of a contract made within the jurisdiction." Cause of action evidently means whole cause of action, i.e. contract and breach. The alternative is, where the contract is made within the jurisdiction, and the breach occurs out of it; in that case, and in that case alone, the cause of action need not have arisen within the jurisdiction. Two cases, *Sichel* v. *Borch* (1), in the Exchequer, and *Allhusen* v. *Malgarejo* (2), in the Queen's Bench, have decided that "cause of action" means the whole cause of action. In the former, Pollock, C.B., says (3): "It has been laid down in an analogous matter that the term 'cause of action' means the *whole* cause of action. Here, the cause of action is the contract and the breach of it. It does not follow that because the breach of contract took place in this country the cause of action arose within the jurisdiction of the superior Courts." In *Allhusen* v. *Malgarejo*, Blackburn, J., says (4): "It is not enough to shew that, though the contract was made abroad, the breach occurred within the jurisdiction. If the whole cause of action,—that is, the contract and the breach,—does not arise within the jurisdiction, then ss. 18 and 19 have no application. The Court of Exchequer have decided this point in this way, and in my opinion that decision is quite right." The words used in the 9 & 10 Vict. c. 95, s. 60, are "*the* cause of action." *Fife* v. *Round* (5), where it was held that the dishonor of a promissory note drawn abroad, but made payable in London, constituted a cause of action arising here within s. 18, occurred before the cases above referred to.

[MONTAGUE SMITH, J., referred to *Forbes* v. *Smith*. (6)]

Wilde v. *Sheridan* (7) turned upon the construction of the County Court Act.

Hughes, in support of the rule. First. The application to set aside the writ was premature; the objection does not properly arise until the plaintiff applies for leave to proceed. There is no question here as to two causes of action, as there was in *Diamond* v.

(1) 2 H. & C. 954; 33 L. J. (Ex.) 179.
(2) Law Rep. 3 Q. B. 340.
(3) 2 H. & C. 957; 33 L. J. (Ex.) at p. 180.
(4) Law Rep. 3 Q. B. 343.
(5) 6 W. R. 282.
(6) 10 Ex. 717; 24 L. J. (Ex.) 167.
(7) 21 L. J. (Q.B.) 260.

Sutton. (1) *Hutton* v. *Whitehouse* (2) shews that the proper time for objecting to the jurisdiction is, when the plaintiff applies for leave to proceed. Secondly. The material question, however, is, what is the meaning of "a cause of action" which arose within the jurisdiction. The defendant is a British subject residing in the Isle of Man. The contract was made there, but was broken in Manchester Upon the balance of authorities "a cause of action" arises where the breach takes place. In *Sichel* v. *Borch* (3) the defendant was a foreigner, and Pollock, C.B., and Martin, B., rest their decision mainly on the consequent hardship; and the former refers to the county-court cases. Pigott, B., however, seems to have entertained a strong opinion the other way. (4) He refers to *Mondel* v. *Steele.* (5) In *Allhusen* v. *Malgarejo* (6), it is put entirely on the analogy to the cases on the County Court Act. The action in the Queen's Bench having been discontinued, a fresh action was brought in this Court: and Willes, J., acting upon his own construction of the statute, allowed the plaintiff to proceed, and he recovered large damages. (7) *Fife* v. *Round* (8), *Chapman* v. *Cottrell* (9), *Slade* v. *Noel* (10), and *Nettlefold* v. *Füncke* (11), are all confirmatory of the plaintiff's view.

BOVILL, C.J. The question is one of importance as affecting the practice of the Court, and therefore we will consider it.

Cur. adv. vult.

The judgment of the Court (Bovill, C.J., and Keating, Montague Smith, and Brett, JJ.) was delivered by

BRETT, J. In this case the plaintiff sued the defendant, a British subject resident in the Isle of Man, upon an alleged breach of a contract not to indorse a bill of exchange delivered to him as a security. The contract, it was said, was made in the Isle of Man. The breach by indorsing over took place in Manchester.

(1) Law Rep. 1 Ex. 130.
(2) 1 H. & N. 32.
(3) 2 H. & C. 954; 33 L. J. (Ex.) 179.
(4) See 33 L. J. (Ex.) 180.
(5) 8 M. & W. 640.
(6) Law Rep. 3 Q. B. 340.
(7) See Law Times of June 19, 1869, vol. 47, p. 142.
(8) 6 W. R. 282.
(9) 3 H. & C. 865; 34 L. J. (Ex.) 186.
(10) 4 F. & F. 424.
(11) Day's C.L.P. Acts, 3rd ed. p. 18.

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The plaintiff, under the provisions of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), had served the writ of summons on the defendant in the Isle of Man. The defendant, without waiting for the plaintiff to take the next step, of obtaining an order to proceed, took out a summons before the master, and obtained an order to stay further proceedings in the suit, on the ground that the whole cause of action did not arise within the jurisdiction of the Court. Upon this the plaintiff took out a summons before Bramwell, B., to set aside such order; and Bramwell, B., referred the matter to the Court.

On the part of the plaintiff, it was contended that the summons taken out by the defendant before the master was premature, and therefore unauthorized; that the objection, if otherwise valid, could only be taken when the plaintiff should apply for leave to proceed; and, further, that the defendant's objection, if taken at the right time, was invalid, because, in order to entitle the plaintiff to proceed, it was not necessary that he should satisfy the Court that the whole cause of action, in the sense of every fact necessary to be proved in order to support the plaintiff's case, had arisen or taken place within the jurisdiction.

On the part of the defendant it was contended that the summons before the master was not premature,—*Binet* v. *Picot* (1); *Diamond* v. *Sutton* (2); and that it was a fatal objection to any further proceeding in the suit by the plaintiff, that the whole cause of action, in the sense above mentioned, did not arise within the jurisdiction.

As to the first point, we see no objection to the master's order made with regard to the process of the Court, on the ground that it is made upon a summons taken out by the defendant, instead of upon a summons taken out by the plaintiff. We agree with the decisions, cited during the argument, of the Court of Exchequer.

The second point is one of great importance. Besides its application to shipping-contracts made in all parts of the world, the daily increasing trade with the more adjacent countries of the continent, in the course of which numerous orders are given abroad, either to firms wholly foreign, or to British subjects resident and carrying on business abroad, but which orders are to be

(1) 4 H. & N. 365; 28 L. J. (Ex.) 244. (2) Law Rep. 1 Ex. 130.

fulfilled in England, makes the question now before the Court one of the greatest mercantile interest.

During the argument, several decisions of the Courts were cited. If in this case and in those cited there had been an appeal to a court of error, we might have felt bound to decide in accordance with the later decisions of courts of co-ordinate jurisdiction, and have left the parties to appeal. But there is no such appeal; and, moreover, we find that the decisions are far from uniform.

The cases relied on by the defendant are, first, *Sichel* v. *Borch.* (1) It was an action by the plaintiff as indorsee against the defendant as indorser of a bill of exchange. The defendant, who was a native of Norway, and not a British subject, and carried on business in Norway, drew the bill there, and indorsed it and sent it by post to London to H. Dresser & Co., who indorsed it to the plaintiff. The defendant was served in Norway with notice that the action had been commenced against him. The Court made absolute a rule to set aside the service, on the ground that the case was not within s. 19 of the statute 15 & 16 Vict. c. 76. Pollock, C.B., and Martin, B., stated that the whole cause of action must arise within the jurisdiction; and that, where the contract was made abroad, and the breach took place in England, the case was not within the statute. Pollock, C.B., referring evidently to the cases upon the construction of the County Court Acts, stated that it had been laid down in an analogous matter that the term "cause of action" means "the whole cause of action." Pigott, B., expressed considerable doubt, but acquiesced in the decision. No previous case was cited. The former decision of the Court of Exchequer in *Fife* v. *Round* (2) was not cited; and the attention of the Court was not called to the difference of rule applicable to the construction of statutes in questions of jurisdiction affecting superior and inferior courts. The next case relied on was *Allhusen* v. *Malgarejo.* (3) In that case, the defendant, a foreigner residing abroad, entered into a contract abroad with the plaintiffs to sell them a quantity of manganese, to be delivered at Newcastle-upon-Tyne. The Court, consisting of Blackburn, Mellor, and Lush, JJ., held that the whole cause of action did not arise within the jurisdiction, and

(1) 2 H. & C. 954; 33 L. J. (Ex.) 179.

(2) 6 W. R. 283.

(3) Law Rep. 3 Q. B. 340.

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therefore the case was not within the statute. They decided on the authority of *Sichel* v. *Borch.* (1) They seem to have doubted the authenticity of the reports of the cases of *Slade* v. *Noel* (2) and *Nettlefold* v. *Füncke.* (3) The former decision of the Court of Exchequer was not before them. In the case of *Fife* v. *Round* (4), a promissory note, by which the defendant promised four months after date to pay the plaintiff 150*l.*, was made in France, and delivered to the plaintiff there. The note was in the margin made payable at a London bank. On being there presented, it was dishonored. Bramwell, B., had made an order under s. 18 of the Common Law Procedure Act, 1852, impowering the plaintiff to proceed. Upon a motion to set aside such order, it was argued that the cause of action did not arise in England; and the county-court cases were cited. The Court, consisting of Pollock, C.B., Martin, Watson, and Channell, BB., upheld the order; Pollock, C.B., and Martin, B., both stating that the cases upon the construction of the County Court Acts did not apply. In *Slade* v. *Noel* (2), a charterparty, made abroad, entitled the ship-owner to demurrage for delay at the port of discharge in England. Williams, J., at chambers, after, as it is stated, a careful consideration, held that the case was within s. 18, and made an order impowering the plaintiff to proceed. In a case of *Nettlefold* v. *Füncke,* Willes, J., in March, 1866, at chambers, held that a delivery of goods in England under a contract made abroad, brought, in an action for the price, the case within s. 18, and made an order impowering the plaintiff to proceed. The same learned judge, in the case of *Allhusen* v. *Malgarejo* (5), which had been discontinued in the Court of Queen's Bench, and brought upon a new writ of summons in the Court of Common Pleas after the decision above cited of the Court of Queen's Bench, made an order under s. 18, giving leave to the plaintiff to proceed; and the plaintiff recovered large damages. The decision is reported in the Law Times of June 19th, 1869: and the learned judge said: "I make this order according to the practice followed since the Act passed, and according to the construction of the Act which I have reason to believe

(1) 2 H. & C. 954; 33 L. J. (Ex.) 179.
(2) 4 F. & F. 424.
(3) Day's C. L. P. Acts, 3rd ed. p. 18.
(4) 6 W. R. 293.
(5) Law Rep. 3 Q. B. 340.

was intended. The cases affecting the jurisdiction of the inferior courts are, I think, quite inapplicable. The superior Courts had jurisdiction in such a case before this Act, by proceedings in outlawry. They have such jurisdiction now on the subject-matter confessedly. If the defendant chooses to raise the question, he can do so by motion, or perhaps by plea in abatement. I do not feel myself at liberty to depart from the usual practice, without a decision of the Court in which the process is, viz. the Common Pleas."

Upon this state of the authorities, and in the absence of any appeal to a superior tribunal, we feel bound to inquire closely and anxiously for ourselves what is the true construction of ss. 18 and 19 of the statute 15 & 16 Vict. c. 76.

According to a familiar canon of construction, it is first desirable to consider what was the law at the time the statute passed. So far as relates to the question of jurisdiction, we apprehend that the superior Courts of England did not decline *jurisdiction* in the case of *any transitory cause of action*, whether between British subjects or foreigners, resident at home or abroad, or whether any or every fact necessary to be proved in order to establish either the plaintiff's or the defendant's case arose at home or abroad. Though every fact arose abroad, and the dispute was between foreigners, yet the Courts, we apprehend, would clearly entertain and determine the cause, if in its nature transitory, and if the process of the Court had been brought to bear against the defendant by service of a writ on him where present in England. In *Ilderton* v. *Ilderton* (1), Eyre, C.J., in discussing the question of the jurisdiction of the English Courts to try questions arising abroad, and the fiction used as to laying the venue, says: "Of matters arising in a foreign country, pure and unmixed with matters arising in this country, we have no proper original jurisdiction; but *of such matters as are merely transitory, and follow the person*, we acquire a jurisdiction by the help of that fiction to which I have alluded, and we cannot proceed without it: but, if matters arising in a foreign country mix themselves with transactions arising here, or if they become incidents *in an action the cause of which arises here*, we have jurisdiction. . . . In the very infancy of commerce, and in the strictest

(1) 2 H. Bl. 145, 162.

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times, as I collect from a passage in Brooke, Trial, pl. 93, the cognizance of *matters arising here* was understood to draw to it the cognizance of all matters arising in a foreign country which were mixed and connected with it; and in these days we shall hardly hesitate to affirm that doctrine." In *Mathews* v. *Erbo* (1), "it was moved to set aside an execution upon an outlawry against the defendant, upon affidavit that the defendant was an alien merchant, and lived beyond the sea, and was commorant there during all the time that the plaintiff proceeded to outlaw him. But it was denied by the whole Court, because by this means any person might contract debts and then go beyond sea, and so he will be out of reach of the law."

No objection was ever raised to the jurisdiction of the Courts over the subject-matter; the difficulties which arose were always with regard to the mode of procedure. A British subject resident abroad could not be served there with a writ of summons. By a process somewhat intricate and tedious, but well established, he might be sued nevertheless to judgment and execution in respect of any cause of action over which the English Courts had jurisdiction. The Courts permitted a course of procedure against him which ended in his outlawry, and, that being once established, the plaintiff proceeded to judgment and to an equivalent for execution against any property of the defendant in England. So, with regard to a foreigner and alien, the Courts, by permitting a writ of distringas to issue against any property of his found within the jurisdiction, compelled him to appear, or pursued him to outlawry and judgment. And there is no trace of any objection ever having been maintained on the ground that in a transitory action there was no jurisdiction unless every fact necessary to be proved in order to support the action occurred within the jurisdiction.

Such being the state of the law with regard to jurisdiction and procedure, the statute in question was passed. It is an Act "to amend the process, practice, and mode of pleading in the superior Courts of common law," &c. It does not, therefore, affect to give or to take away jurisdiction, but only to regulate process and practice and pleading *in cases already within the jurisdiction.* The

(1) 1 Ld. Raym. 349.

mischief to be remedied is recited thus: "Whereas, the process, practice, and mode of pleading in the superior Courts of common law at Westminster may be rendered more simple and speedy: be it enacted," &c. The statute then, under the heading which precedes s. 2, proceeds to deal with *personal actions against defendants whether in or out of the jurisdiction* of the Courts; and in s. 2 and subsequent sections deals, not with jurisdiction, but with the writ of summons and the service of it in the case of defendants *residing or supposed to reside within the jurisdiction.* Then, by s. 18, the statute assumes to deal with the case of defendants, *being British subjects, residing out of the jurisdiction*:—"In case any defendant, being a British subject, is residing out of the jurisdiction of the said superior Courts, in any place except in Scotland or Ireland, it shall be lawful for the plaintiff to issue a writ of summons," &c. In thus legislating with regard to the writ of summons, which is the commencement of the suit, there is no restriction or alteration of jurisdiction; the kind of action is not here mentioned; it is no otherwise limited than by the heading before s. 2 to the series of sections from s. 2 to s. 25, inclusive. The only limitation of kind of action therefore is, that it must be *a personal action.* Section 18, then, having dealt with the writ of summons and the issue of it, proceeds to deal with *the further continuance of the suit*:—"And it shall be lawful for the Court or judge, upon being satisfied by affidavit that there is *a cause of action which arose within the jurisdiction, or in respect of the breach of a contract made within the jurisdiction*, and that the writ was personally served upon the defendant, or that reasonable efforts were made, &c., to direct from time to time that the plaintiff shall be at liberty *to proceed in the action*," &c.

The order of the judge is not an order to enable the plaintiff to bring an action. The action is already brought by the issue of the summons. The Court has already assumed jurisdiction, if the action be personal, and touching a subject-matter within the ordinary jurisdiction of the Court. The order in question is an order made *in the cause*, directing that the plaintiff may *proceed in the action*, i.e. proceed in the action already previously instituted. Then arises the question in dispute, which is, what is the meaning of the phrase "a cause of action." Now, in the drawing of the

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Act, that phrase is made applicable to two subsidiary phrases. If the section were expanded, it would read thus:—"That there is a cause of action which arose within the jurisdiction, or a cause of action in respect of the breach of a contract made within the jurisdiction." In the second collocation, the phrase "cause of action" clearly does not mean the whole cause of action, as contended for on behalf of the defendant. It means the breach of contract, which breach occurs out of the jurisdiction. But, if the phrase "a cause of action," when applied to the second subsidiary phrase, does not mean the whole cause of action in the sense contended for, can it be properly said to have that sense when applied to the first subsidiary phrase? Can the same phrase have two different meanings? Is not the natural reading rather this, that it means the same thing when applied to both? It is that which in popular meaning,—for many purposes, in legal meaning,—is "the cause of action," viz. the act on the part of the defendant which gives the plaintiff his cause of complaint. In the first collocation, that is supposed to occur within the jurisdiction, in the second, without the jurisdiction.

If this be the true construction of s. 18, it is also the construction of s. 19, which is applicable to foreigners. By so reading the sections, they are made applicable only to procedure, and not to jurisdiction. They deal, according to the title of the statute and the recital of what it was intended to improve, with the process and practice of the Court. Section 24 shews that ss. 18 and 19 are really substituted for the former intricate proceedings "on a writ of distringas for the purpose of compelling appearance or for proceedings to outlawry."

If the construction contended for by the defendant be admitted the statute, which is intended to apply only to the simplification of process and practice, is made to apply to jurisdiction; the phrase in the section which has been commented on is made to have two different meanings; and the jurisdiction of the superior Courts is limited and ousted by words in a statute, which, as it seems to us, at least do not clearly so enact. This last is contrary to a well-established rule of construction.

For the reasons thus given, we are of opinion that the invariable practice of this Court from the passing of the Act until now has

been and is correct, and that the master's order in this case, staying further proceedings, was wrong, and should be set aside.

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Rule absolute.

Attorneys for plaintiff: *Gray, Johnston, & Mounsey.*

Attorney for defendant: *W. A. Holcombe, for T. E. Jones, Manchester.*

SIR I. B. GUEST, BART., *v.* THE POOLE AND BOURNEMOUTH RAILWAY COMPANY.

June 1.

Railway Company—Notice of Intention to Purchase Land—Lands Clauses Act, 1845 (8 & 9 *Vict. c.* 18), *s.* 16.

It is no answer to an action against a railway company for not issuing their warrant under s. 39 of the Lands Clauses Act, 1845, for the assessment of compensation for land which they have given notice of their intention to purchase, that the undertaking was intended to be carried into effect by means of a certain capital, and that the whole amount has not been subscribed, as required by s. 16, —the notice to treat not necessarily being an exercise of the powers of the Act "in relation to the compulsory taking of land."

22 L.J.

DECLARATION against the defendants, a railway company, for not issuing a warrant for the assessment of compensation for land of the plaintiff which they had given notice of their intention to purchase under the provisions of the Lands Clauses Act, 1845 (8 & 9 Vict. c. 18), with a claim for a peremptory writ of mandamus.

Plea: That the defendants are a company incorporated under The Poole and Bournemouth Railway Act, 1865 (28 & 29 Vict. c. xix), and that the Lands Clauses Act, 1845, is incorporated with that Act, and the defendants were so incorporated for the purpose of constructing certain railways, and such purpose was intended to be carried into effect by means of a capital, to wit, 90,000*l.*, to be subscribed by the promoters of the undertaking; that, at the time when the defendants so first gave notice to the plaintiff as in the declaration mentioned, that is to say, on the 16th of May, 1868, the whole of the capital, that is to say, the said sum of 90,000*l.*, had not been subscribed under a contract binding the parties thereto, for the payment of the several sums by them respectively subscribed, or otherwise howsoever, pursuant to the provisions of the

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Lands Clauses Act, 1845, and of the Poole and Bournemouth Railway Act, 1865; and that the capital never has been subscribed as aforesaid, and that the defendants have always been, and still are, wholly unable to obtain the same to be so subscribed, or to obtain the same.

Demurrer, on the ground that the defendants were estopped from denying the legality of their notice to treat. Joinder.

Bridge (*Mellish, Q.C.*, with him), in support of the demurrer. The plea is founded on s. 16 of the Lands Clauses Act, 1845. (1) That section, however, was introduced for the protection of the land-owner, not to make it illegal for the company to treat with one who is willing to sell: see *Reg.* v. *Ambergate, Nottingham, &c., Ry. Co.* (2) The true test is whether both parties are aware of the illegality.

[WILLES, J., referred to *Fairtitle* d. *Mytton* v. *Gilbert* (3), *Doe* d. *Watton* v. *Penfold* (4), and *Royal British Bank* v. *Turquand.* (5)]

Milward, Q.C. (*Petheram* with him), contrà. The legislature having declared it to be illegal for the company to put in force any of the powers created by the Acts in relation to the compulsory taking of land for the purposes of the undertaking until the whole capital is subscribed, it is not competent to them to go on to assess the compensation to be paid for any land in respect of which they have given notice. Where an Act of Parliament declares that a thing shall not be done, that is equivalent to a declaration that it is contrary to law: *Eastern Counties Ry. Co.* v. *Hawkes* (6); *Taylor*

(1) 8 & 9 Vict. c. 18, s. 16, enacts that, "Where the undertaking is intended to be carried into effect by means of a capital to be subscribed by the promoters of the undertaking, the whole of the capital or estimated sum for defraying the expenses of the undertaking shall be subscribed under contract binding the parties thereto, their heirs, executors, and administrators, for the payment of the several sums by them respectively subscribed, before it shall be lawful to put in force any of the powers of this or the special Act, or any Act incorporated therewith, in relation to the compulsory taking of land for the purposes of the undertaking."

(2) 22 L. J. (Q.B.) 191. 17 Jur 660

(3) 2 T. R. 169.

(4) 3 Q. B. 757.

(5) 5 E. & B. 248; 24 L. J. (Q.B.) 327: in error, 6 E. & B. 327; 25 L. J. (Q.B.) 317. 1 Jur N.S. 1054. 2 L. 663.

(6) 5 H. L. 331.

v. *Chichester and Midhurst Ry. Co.* (2) There is nothing in the statute to shew that the interest of the land-owner was in the contemplation of the legislature rather than that of the shareholders or the public. The requirements of the Act must be complied with before the company can proceed.

[WILLES, J. Is not the giving of the notice one of the powers conferred by the Act?]

The notice may be either with a view to an amicable arrangement or with a view to the exercise of the compulsory powers of the Act.

Bridge, in reply.

WILLES, J. I am of opinion that our judgment should be for the plaintiff. The question is whether the defendants were bound to issue their warrant for assessing the price of the plaintiff's land which they had given him notice of their intention to take, under the provisions of the Lands Clauses Act, 1845. The defendants by their plea insist that they are not bound to do so, because the undertaking for which they were incorporated was intended to be carried into effect by means of a certain amount of capital, and the whole sum had not been subscribed, as required by s. 16 of the Act; and the question raised is, whether that circumstance justifies the defendants in refusing to proceed to assess the compensation payable to the plaintiff. That section enacts in substance that, where the undertaking is intended to be carried into effect by means of a capital to be subscribed by the promoters, the whole shall be subscribed before it shall be lawful to put in force any statutory powers in relation to the *compulsory* taking of land. It is contended on the part of the defendants that, as the whole of the intended capital had not been subscribed, the giving of the notice was a vain and inoperative act, which could not be the foundation of any right in the land-owner to have the value of the land assessed thereunder. No doubt, the giving the notice was an inoperative act, so far as the company were concerned, if it was intended to be followed up by a compulsory proceeding under the subsequent clauses before the entire amount of capital had been subscribed.

(1) Law Rep. 2 Ex. 356. Since reversed on appeal in H. L., Weekly Notes, 1870, p. 179.

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But, to hold that it was inoperative as against the land-owner, would be to put him in a very inconvenient situation. The knowledge being with the company, and not with the land-owner, it would put it in their power, as is said by Lord Denman in *Reg.* v. *Commissioners of Woods and Forests, re Budge* (1), by giving a notice, to prevent the owner from doing what he pleased with his own land, accompanied with this additional circumstance, that the company might abstain from having the subscription completed, and so keep the notice inoperative, except to impose an impediment with the owner's dealing with the land during the period limited by the Act for the taking of land, themselves retaining the option of proceeding or not at their pleasure. If such be the law, the land-owner must bear the inconvenience which it imposes upon him; but we should be careful not to put a construction upon the Act which will lead to such consequences, unless we are compelled to do so. The first suggestion of the intention of the legislature is, that this 16th section should operate as a sort of Mortmain Act, to make it contrary to public policy that the company should take any land until the condition has been complied with. That consideration, however, is excluded by the circumstance that the section is directed against compulsory taking of land only, and not against purchases by agreement. It is clear, therefore, that it is not with reference to public policy that the enactment in question was framed. Nor can the restraint be said to have been imposed for the benefit of the shareholders, seeing that the directors might bind the company by agreement to take land without the intervention of a jury. There only remains, then, this view, viz. that, large powers being given to the company to take the lands of owners along the line of the intended railway against their will for the purpose of the undertaking, it was intended that it should be a condition precedent to the exercise of those powers that the entire capital contemplated should first be subscribed. One argument in favour of the creation of such a power is, the expectation of benefit to the public, to be shared by the land-owners along the line. In that point of view s. 16 seems to have been designed solely for the protection of those against whom the compulsory powers of the Act are to be exercised. Is the

(1) 17 L. J. (Q.B.) 341.

proceeding which the company are required to take a power of the Act in relation to the compulsory taking of land under the Act? It falls under the general heading, "with respect to the purchase and taking of lands otherwise than by agreement." That seems to afford some reason for thinking that it has reference only to the compulsory taking of land. But, when we look to the general scope of this part of the Act, we find that it is not so. The series of sections commences with a provision which evidently contemplates that no compulsion may be necessary. Sect. 18 enacts that, when the promoters of the undertaking shall require to purchase or take any lands, they shall give notice thereof to the parties interested in the lands, and by such notice shall demand the particulars of their estate and interest in the lands and of the claims made by them in respect thereof, stating in the notice that they are willing to treat for the purchase and as to compensation for damage. It is obvious that that notice may or may not be followed by an agreement between the parties. It is a neutral proceeding. It may be an amicable proceeding, or it may be a hostile one within the operation of s. 16. There may also be an intermediate case; the proprietor of the land may be willing to sell the land at such price as a jury may assess its value at. In that case, the land would be taken with his assent, but subject to a valuation. The provisions applicable to that state of things are to be found in the 21st and following sections. The 21st enacts, that if for twenty-one days after service of the notice the owner shall fail to state the particulars of his claim, or to treat with the promoters in respect thereof, or if the parties shall not agree as to the compensation to be paid for the interest in the land or for the damage which may be sustained, the amount shall be settled as after provided. Let us assume that, in answer to the notice, the owner of the land makes a demand of 1000*l.*, and the company are willing to pay 900*l.*, but both are willing to refer the matter to a valuer,—would that be a case of compulsory taking of land, merely by reason of the doubt as to the amount of compensation to be paid for it? Clearly not. It would be a taking of land by agreement, though the parties cannot at once fix the price. Sect. 22 shews clearly that these clauses deal with the notice as not being an exercise of the compulsory powers. It provides that, if no

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agreement be come to as to the value of the land, or as to the compensation to be made in respect thereof, and the claim does not exceed 50*l.*, it shall be settled by two justices. Then comes s. 23, and following sections, which deal with assessments by arbitration or by a jury where the claim exceeds 50*l.*, and the parties are willing to sell but are unable to agree as to the amount of compensation. It does not appear to me to be useful to go into the cases upon the construction of these provisions. They are not easily reconcileable; but a reference to them will clearly shew that notices to treat have not been dealt with as an exercise of the compulsory powers of the Act. For these reasons, I think s. 16 affords no answer to the plaintiff's claim, and consequently, that he is entitled to judgment on this demurrer.

MONTAGUE SMITH, J. I am of the same opinion. After the discussion this case has undergone, it seems to me to be a very plain one. It clearly is not ultrà vires for the company to purchase land before the whole of the capital has been subscribed. But, for the protection of the land-owner, s. 16 provides that the compulsory powers for the taking of land shall not be put in force until the whole of the capital of the company shall have been subscribed. That section imposes a condition on the company when seeking to enforce their powers for the compulsory taking of land; but it does not prevent them from treating for the purchase of land and acquiring it by agreement. The giving of notice is not a putting in force of the compulsory powers of the Act. It may either lead to an agreement, or it may be a step towards the exercise of the compulsory powers. In itself it is a neutral proceeding. That is clearly shewn by the clauses which follow s. 16. Upon this short ground, it seems to me that the plea is no answer. If the legislature had intended to make it unlawful to treat for the acquisition of land before the whole capital had been subscribed, one would have expected to find clear words to that effect. But none such are found. The 16th section was evidently framed for the protection of the land-owner, that his land should not be compulsorily taken from him for the formation of the railway until the company were in a condition to pay him for it. The mischief is, of course, as great either way so far as the

public are concerned. Any other construction of the Act than this would place the land-owner in the greatest possible difficulty. He has no means of knowing whether or not the whole capital has been subscribed. It is true that s. 17 provides that a certificate of the fact under the hands of two justices shall be evidence that the whole of the prescribed capital has been subscribed; but that certificate is only to be obtained on the application of the promoters of the undertaking; and the evidence would be wanting if they did not choose to apply for it. This case is not governed by *Taylor* v. *Chichester and Midhurst Ry. Co.* (1) The decision there turned on the question whether the agreement declared on was ultrà vires, in the sense that the legislature intended that such a contract should not be made. The majority of the Court of Exchequer Chamber held that it was, and that the company was therefore not bound by it. (2) Here, we hold that the proceeding to treat for the purchase of the land is not ultrà vires, and that s. 16 was framed for the protection and benefit of the land-owner. For these reasons, I concur in thinking that the plaintiff is entitled to judgment.

BRETT, J. The plaintiff is not bringing an action for the breach of a contract independent of the Act. There is no such contract. That which the plaintiff is asking for is that a mandamus may issue commanding the defendants to issue their warrant to the sheriff to assess the compensation to which he is entitled for the taking of his land; and he founds that claim on an allegation that the company have given him a notice to treat under the provisions of the Lands Clauses Act, 1845. The company say in answer that they have not given a valid notice within the Act, the notice they have given being one which they were expressly forbidden by the Act to give. If it be true that there was no valid notice, I should be of opinion that the plaintiff was not entitled to succeed; for, if there was no valid notice, there would be nothing whereon to found his claim. The question, therefore is, whether the notice mentioned in the declaration was valid or not. The defendants contend that the notice was inoperative, because it was an exercise of the powers of the Act for the compulsory taking of land for

(1) Law Rep. 2 Ex. 356.

(2) Since reversed on appeal in H. L.; Weekly Notes, 1870, p. 179.

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the purposes of the undertaking. If that were so, there was a condition binding on them precedent to the giving of the notice, viz. that the whole of the intended capital should be first subscribed. I at one time thought it might have been said that the notice might be good, but that the company could not go on to assess the compensation until the condition was complied with. But, upon consideration, I think the section may be read otherwise. I think it was clearly enacted for the protection of the land-owner. Some notices may be considered as relating to the compulsory taking of land. A notice to treat assented to by the land-owner would not be an exercise of the compulsory powers. But a notice to treat not assented to,—in which case the company would be placed in a situation of hostility to the land-owner,—would be. It follows, therefore, that the notice now in question, having been assented to by the plaintiff, is not an exercise by the company of the compulsory powers conferred on them by the Lands Clauses Act, 1845, or their special Act. Consequently the condition precedent does not attach, and the plaintiff is entitled to judgment.

Judgment for the plaintiff.

Bridge, for the plaintiff, asked for a peremptory writ of mandamus commanding the defendants to issue their warrant to the sheriff to assess the amount of compensation due to the plaintiff, under s. 71 of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), which enacts that, "in case judgment shall be given to the plaintiff that a mandamus do issue, it shall be lawful for the Court in which such judgment is given, if it shall see fit, besides issuing execution in the ordinary way for the costs and damages, also to issue a peremptory writ of mandamus to the defendant, commanding him forthwith to perform the duty to be enforced." (1)

WILLES, J. We cannot do this without some notice to the defendants. There was a case where this matter was discussed in the Exchequer Chamber. It was an action against the defendant for not repairing a bridge, and for a mandamus commanding him to repair and reinstate the bridge. The Court of Queen's Bench

(1) See the form of judgment, Reg. Gen. M. T. 1854, sched. 32; Day, 3rd ed. 454.

held that the defendant was bound to repair, and the plaintiff had judgment in the action, and a peremptory mandamus was awarded. The Exchequer Chamber affirmed the judgment as to the action, but reversed it as to the mandamus, holding that to be discretionary. (1) We will grant you a rule; but it must be on affidavit; something is evidently intended by the words "if the Court shall think fit," beyond the mere record.

On a subsequent day a rule nisi for a mandamus was obtained, and it was afterwards made absolute.

Attorneys for plaintiff: *Bircham & Co.*
Attorney for defendants: *James Wheeler.*

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June 29.

Advertisement for Tenders—Contract.

The defendants sent out a circular, as follows:—"We are instructed to offer to the wholesale trade for sale by tender the stock in trade of A., amounting, &c., and which will be sold at a discount in one lot: payment to be made in cash: the tenders will be received and opened at our offices," &c.:—

Held, that this did not amount to a contract or promise to sell to the person who made the highest tender.

THE second count of the declaration stated that the defendants by their agents issued to the plaintiffs and other persons engaged in the wholesale trade, a circular in the words and figures following, that is to say, "28, King Street, Cheapside, May 17th, 1869. We are instructed to offer to the wholesale trade for sale by tender the stock in trade of Messrs. G. Eilbeck & Co., of No. 1, Milk Street, amounting as per stock-book to 2503*l.* 13*s.* 1*d.*, and which will be sold at a discount in one lot. Payment to be made in cash. The stock may be viewed on the premises, No. 1, Milk Street, up to Thursday, the 20th instant, on which day, at 12 o'clock at noon precisely, the tenders will be received and opened at our offices. Should you tender and not attend the sale, please address to us sealed and inclosed, 'Tender for Eilbeck's stock.' Stock-

(1) *Nicholl* v. *Allen*, 1 B. & S. 916, 934; 31 L. J. (Q.B.) 43, 283.

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books may be had at our offices on Tuesday morning. Honey, Humphreys, & Co.:" And the defendants offered and undertook to sell the said stock to the highest bidder for cash, and to receive and open the tenders delivered to them or their agents in that behalf, according to the true intent and meaning of the said circular: And the plaintiffs thereupon sent to the said agents of the defendants a tender for the said goods, in accordance with the said circular, and also attended the said sale at the time and place named in the said circular: And the said tender of the plaintiffs was the highest tender received by the defendants or their agents in that behalf: And the plaintiffs were ready and willing to pay for the said goods according to the true intent and meaning of the said circular: And all conditions were performed, &c., to entitle the plaintiffs to have their said tender accepted by the defendants, and to be declared the purchasers of the said goods according to the true intent and meaning of the said circular; yet the defendants refused to accept the said tender of the plaintiffs, and refused to sell the said goods to the plaintiffs, and refused to open the said tender or proceed with the sale of the said goods, in accordance with their said offer and undertaking in that behalf, whereby the plaintiffs had been deprived of profit, &c.

Demurrer, on the ground that the count shewed no promise to accept the plaintiffs' tender or sell them the goods. Joinder.

Holl, in support of the demurrer. Although the declaration is somewhat ambiguous, it is evidently intended to raise the question whether one who advertises for tenders for the purchase of goods thereby engages to sell them to the highest bidder. The nearest analogous case is that of an advertisement for tenders for building. It has never been held or suggested that the advertiser is bound to accept the lowest tender. Suppose here there had been only one tender, would the defendants have been bound to accept that? The advertisement clearly does not amount to a contract; it only invites offers.

Morgan Lloyd, contrà. The words of the circular and the averments in the declaration taken together, disclose a contract on the part of the defendants to sell the goods to whoever should make the highest tender. This is not like the case of tenders for a

building. There, the acceptance of the lowest tender is always subject to the architect's judgment as to the character and capacity of the builder. Here, the offer is to sell for cash. The allegation in the count may be sustained either by evidence of a direct promise, or by evidence of the custom of the trade.

[WILLES, J. All the averments are governed by the words, "according to the true intent and meaning of the said circular." It therefore comes round to the question, what is the true meaning of that document.]

The nearest analogy is that of advertisements offering rewards for the discovery and conviction of an offender, of which one of the leading instances is the case of *Williams* v. *Cawardine* (1), where Littledale, J., says: "The advertisement amounts to a general promise to give a sum of money to any person who shall give information which might lead to the discovery of the offender."

WILLES, J. I am of opinion that the defendants are entitled to judgment. The action is brought against persons who issued a circular offering a stock for sale by tender, to be sold at a discount in one lot. The plaintiffs sent in a tender which turned out to be the highest, but which was not accepted. They now insist that the circular amounts to a contract or promise to sell the goods to the highest bidder, that is, in this case, to the person who should tender for them at the smallest rate of discount; and reliance is placed on the cases as to rewards offered for the discovery of an offender. In those cases, however, there never was any doubt that the advertisement amounted to a promise to pay the money to the person who first gave information. The difficulty suggested was that it was a contract with all the world. But that, of course, was soon overruled. It was an offer to become liable to any person who before the offer should be retracted should happen to be the person to fulfil the contract of which the advertisement was an offer or tender. That is not the sort of difficulty which presents itself here. If the circular had gone on, "and we undertake to sell to the highest bidder," the reward cases would have applied, and there would have been a good contract in respect of the persons. But the question is, whether there is here any offer to enter

(1) 4 B. & Ad. 621, 623. And see *Thatcher* v. *England*, 3 C. B. 254.

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into a contract at all, or whether the circular amounts to anything more than a mere proclamation that the defendants are ready to chaffer for the sale of the goods, and to receive offers for the purchase of them. In advertisements for tenders for buildings it is not usual to say that the contract will be given to the lowest bidder, and it is not always that the contract is made with the lowest bidder. Here there is a total absence of any words to intimate that the highest bidder is to be the purchaser. It is a mere attempt to ascertain whether an offer can be obtained within such a margin as the sellers are willing to adopt.

KEATING and MONTAGUE SMITH, JJ., concurred.

Judgment for the defendants.

Attorneys for plaintiffs: *Herbert, Lloyd, & Lane.*
Attorneys for defendants: *Reed, Phelps, & Sidgwick.*

May 28.

THOMPSON *v.* HILL AND OTHERS.

Metropolitan Building Act, 1855 (18 & 19 *Vict. c.* 122)—*Duty of protecting Rooms exposed by the outer Walls being pulled down.*

A building owner who pulls down a party-wall under the authority of the Metropolitan Building Act, 1855, is not bound to protect by a hoarding or otherwise the rooms of the adjoining owner which are left exposed to the weather during the time that the wall is being pulled down and rebuilt.

DECLARATION: 1st count, for obstructing a public footpath in front of the plaintiff's shop; 2nd count, for obstructing the plaintiff's lights whereby he was prevented carrying on his business of a tailor, and lost the profits of it; 3rd count, for depriving the plaintiff's house of support from the neighbouring house and land, to which he was entitled.

Pleas: 1. Not guilty by statute 18 & 19 Vict. c. 122, ss. 83, 108. 2. To the 1st count, a justification under a licence from the Commissioners of Sewers for the City of London. 3. To the 2nd count, a denial of the plaintiff's right to the light. 4. To the 3rd count, a denial of the plaintiff's right to support. 5. To the same count, a justification under the Metropolitan Building Act, 1855 (18 & 19 Vict. c. 122).

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The plaintiff joined issue on these pleas, new assigned as to the 2nd plea, and pleaded additional replications to the 5th plea, which became immaterial.

At the trial before Keating, J., at the sittings in London after Michaelmas Term, it appeared that the plaintiff had for some years occupied a small tailor's shop in a court leading out of Tower Hill, but had no lease of the premises, and was a mere tenant at will. His business produced about 2*l.* a week. The defendants had purchased some adjoining houses, and built upon their site some lofty warehouses which interfered with the plaintiff's light. The defendants erected the building without the plaintiff's permission and in spite of his protest. The stoppage of the path in front of the plaintiff's shop, and the loss of light, almost entirely destroyed his trade from November, 1868, until the action was commenced in April, 1869. For the purpose of building the warehouses the defendants pulled down, under the powers of the Metropolitan Building Act, 1855 (18 & 19 Vict. c. 122), the wall of the plaintiff's house, which was in a dangerous state. They executed the works with reasonable speed and care, but during the time the wall was being pulled down and rebuilt they provided no covering for the plaintiff's rooms, which were exposed. There was no evidence of wrongful interference with the support of the plaintiff's house, but the judge consented to amend the third count so as to enable the plaintiff to recover damages for the injury sustained by him by his rooms not having been protected by the defendants from the weather during the pulling down of the party wall, if that really gave the plaintiff any right of action. The jury found for the defendants on the first count; and for the plaintiff on the second count, damages 50*l.*; and for the plaintiff on the third count, damages 10*l.*; leave being reserved to the defendants to move to set aside the verdict on the third count, the plaintiff to be at liberty to amend the count, or frame a new count, in any way he might be able, so as to obtain compensation for the exposure of his rooms during the pulling down and rebuilding of the wall.

Robinson, Serjt., having obtained a rule for a new trial on the ground that the damages were excessive on the second count, and

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to set aside the verdict on the third count on the ground that the judge ought not to have amended it, and that the facts proved at the trial gave the plaintiff no cause of action.

Willis shewed cause. The damages were not excessive. It is clear that the plaintiff sustained substantial damage from the loss of his business, and was entitled to liberal compensation. With respect to the third count, no doubt an amendment is necessary, but the plaintiff is entitled to recover the 10*l.* under a count properly framed. The Metropolitan Building Act, 1855, authorized the pulling down of the wall, but only in a reasonable manner, and without causing unnecessary inconvenience (see s. 85, sub-sect. 3), and it is not reasonable to pull down the wall of a house without in some way covering up and protecting the rooms thereby exposed to the weather. The rooms must be protected by some one; and if the Court holds that it is not the duty of the person pulling down the wall, the expense will be thrown on the occupier, who has no interest in the improvements, and not upon the owner, upon whom the Act clearly intends that the expense of the repairs should fall.

Robinson, Serjt., and *Beasley*, in support of the rule. The plaintiff was only a tenant at will, and the loss to his business cannot have amounted to 50*l.* The damages, therefore, are excessive. The third count cannot be sustained, and no amendment of it can give the plaintiff a right to recover. The defendants have pulled down and built up the wall in a proper manner, and the Act imposes no other obligation on them.

BOVILL, C.J. The plaintiff is not entitled to recover on the third count. I think there was no duty imposed on the defendants, either by statute or at common law, to board up or otherwise protect the plaintiff's rooms, while the wall was down. The inconvenience the plaintiff suffered is one to which persons who live in houses the walls of which are not reasonably safe, must be subject. With respect to the second count, I think the damages are not excessive. The defendants interfered with the plaintiff's rights with a high hand, and the jury were not bound to give as damages only the exact amount of loss which the plaintiff had sustained.

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WILLES, J. I am of the same opinion. Mr. Willis rested his claim under the third count on the statute, which provides that the pulling down of the wall shall be so done as to cause no unnecessary inconvenience. That shews the exact limit of the defendants' obligation, and it does not include the doing an independent act, such as putting up a hoarding, nor was there any implied duty on the defendants to do so. Upon the other point, I think there were grounds upon which the jury might justly give the amount they did; for, independently of the loss of business sustained by the plaintiff, there was the fact that the defendants, who had no right to turn the plaintiff out of his house, made it inconvenient for him to live in it, and an act of that kind done with a high hand, is not to be paid for by a mere calculation of how many shillings or pence the plaintiff would have otherwise earned. The case is similar to *Emblen* v. *Myers* (1) and *Bell* v. *Midland Ry. Co.* (2).

KEATING, J. I am of the same opinion. I should be glad if a count could be framed which would entitle the plaintiff to recover the damage he suffered through the exposure of his rooms, but I quite agree that no such count can be framed, as the defendants were under no legal obligation to protect the plaintiff's rooms.

MONTAGUE SMITH, J., concurred.

PER CURIAM: *Rule discharged, plaintiff to enter the verdict on the second count only.*

Attorney for plaintiff: *J. Morrison.*
Attorneys for defendants: *Lewis & Sons.*

(1) 6 H. & N. 54; 30 L. J. (Ex.) 71.

(2) 10 C. B. (N. S.) 287; 30 L. J. (C.P.) 273.

GRAY AND ANOTHER *v.* PEARSON.

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May 31.

Marine Insurance—Mutual Insurance Club—Right of Manager to sue for Premiums and Calls.

1 QB D 45-8

An association of ship-owners was formed for the mutual assurance of ships belonging to its members. The regulations, subject to which the policies were effected, provided for the creation of a general fund by payment of premiums, &c., by the several members, and, when these should be found insufficient, by payment of contributions in the shape of a per-centage on the sums insured; and a manager (not a member of the association) was appointed by a power of attorney which authorized him to sign policies for and in the names of the members of the association, and, "in their several and respective names," &c., to demand and sue for all sums which should become due and payable for premiums and contributions from them respectively :—

Held, that the manager could not maintain an action against a member for premiums due from such member, or for moneys paid by the manager out of the funds of the association in respect of such member's share of losses due to other members.

DECLARATION for money paid and on accounts stated. The plaintiffs claimed payment from the defendant in respect of the defendant's liability to contribute to the losses of a marine assurance association called "The Temperance and General Marine Insurance Association." The particulars of demand were as follows :—

	£	*s.*	*d.*
"1862. April 21. To cash paid by the plaintiffs for defendant for premiums of insurance on ships *Hope* and *Theodore* . .	11	9	7
"July 7. To ditto ditto	7	15	7
"Nov. 20. To ditto ditto	40	17	9
	£60	2	11

Plea: Never indebted. At the trial a verdict was taken for the plaintiffs, subject to the following case :—

1. Before the making of the policies of insurance on the defendant's vessels hereinafter mentioned, the defendant and the owners of upwards of 150 other vessels executed a power of attorney to John Gray, the father of the plaintiffs, appointing him manager of the association, and authorizing him "for them and in their and each and every of their respective name and names, and as their respective acts and deeds, to sign and undertake all such policy or policies of insurance upon all such ships, &c., belonging to them or any of them respectively as he might deem proper, and for

them severally and respectively, and in their several and respective names and on their respective behalfs, to ask, demand, sue for, &c., all such sums of money as should become due and payable for premiums on every policy of insurance which should be by him underwritten in their respective names, and to give discharges for the same; and also to adjust and settle all such losses, averages, and contributions as from time to time should or might happen, and to draw upon them respectively for, and, if he should think fit to do so, pay and discharge for them respectively and on their respective behalfs or account, their several proportions of or for such losses, averages, and contributions when and as the same should become due to or from any of them respectively for or by reason of any such insurance or insurances to be made by him John Gray in their names respectively as aforesaid; and also for them and on their and each and every of their respective accounts to pay and discharge the premiums attending all and every such insurances so to be made and effected as aforesaid." "And also to substitute or appoint any person or persons to act under or in the place of their said attorney in all or any of the matters aforesaid," &c.,—they thereby agreeing to ratify and confirm whatsoever John Gray as such manager "or the said substitute or substitutes," should lawfully do or cause to be done in the premises by virtue of those presents.

2. After the execution by the defendant of this power of attorney, viz. on the 20th of February, 1861, a policy on the defendant's ship *Hope* was entered into by the defendant and John Gray, and signed by Gray on behalf of the several members of the association. The policy contained the following clause: "It is mutually agreed that the annexed regulations shall form a part of this policy. 500*l.* John Gray, per procuration of the several members of the Temperance and General Marine Insurance Association, every member bearing his equal proportion according to the sums mutually insured therein."

3. The regulations annexed to the policy, so far as material, were as follows:—

The Temperance and General Marine Insurance Association, &c.
Manager, Mr. John Gray.

It is unanimously agreed,—

I. That the members of this association shall severally and respectively, not

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jointly or in partnership, nor the one for the other of them, but each only in his own name, insure each others' ships or shares of ships from noon of the 20th of February, 1861, or from the date of entry of each vessel respectively, until noon of the 20th of February then next, and from that time until noon of the 20th of February in the next succeeding year, and so on from year to year unless notice to the contrary be given as hereinafter mentioned, against all losses, perils, and damages of whatever nature or kind soever which may be sustained or received by their respective ships, or caused or done by them to other ships or craft, except when on the voyages, in the trades, or under the circumstances hereinafter particularly excepted: Provided, nevertheless, that, if any member fail to pay his proportion of any loss or losses, in consequence of bankruptcy or insolvency, the deficiency of payment shall fall on and be borne by the whole solvent members proportionately according to the sums insured.

II. That the committee for superintending the affairs of this association do consist of the following gentlemen [naming six], who shall meet once a quarter, or oftener if required, to audit the accounts and settle claims. No member of the committee shall act as such in the settlement of his own loss or average.

III. That the ships to be admitted and insured by this association shall be such only as are approved by the committee of management; that the committee shall have full power and are hereby authorized to classify and inrol the various vessels as admitted by them for insurance, into first, second, and third class risks, . . . and that the sums to be insured in this association shall be from 200*l.* to 1000*l.* on each ship, with power to increase it to 1500*l.*

VI. The premiums of insurance charged against each member shall form the fund for paying all losses sustained by the association, that is to say, each member shall bear his share of such losses and expenses in proportion to the amount of premiums charged: Provided, nevertheless, that, if the gross amount of losses and expenses for the year shall exceed the amount of premiums realized, the deficiency shall be made good by an additional per-centage upon the premiums which the members shall be bound respectively to contribute and pay to the manager. But, if the premiums realized shall exceed the losses and expenses incurred, then and in that case the surplus shall be divided among the members rateably according to the amount of premiums contributed by them respectively.

VII. That the manager's drafts on the members of this association for their proportion of the annual fixed premium, and for any additional per-centage thereon, shall be duly accepted and punctually paid when due; and, if any member shall neglect, omit, or refuse to accept any such drafts, or to pay his contributions thereto on receiving notice from the manager, his respective ship or ships shall cease to be insured in or by this association, and he shall thenceforth forfeit all claims for or in respect of any loss or average under his policy or policies effected therein; but he shall still remain liable to contribute to all losses and averages which may occur during the period for which any such policy was originally granted.

VIII. That, in order to provide for the payment of losses as they may happen in the course of the year, the manager shall be entitled, and is hereby impowered, to levy quarterly collections of one-fourth part of the fixed annual premium payable in advance, by drafts at sixty days respectively from the 20th of February,

May, August, and November. Members entering their ships after the 20th of February to pay a premium from the date of entrance only.

XXI. That any member intending not to renew his policy on its expiration at the next succeeding 20th of February shall give to the manager notice in writing of such intention ten days at least before such expiration; and, if such notice shall not be given, then such policy shall be renewed, except in cases where the committee may deem it improper to renew the same, when they shall cause a similar notice to be given to the parties concerned; but, in either case, when a ship may be at sea on such 20th of February, the committee shall, if required by the association, grant a policy from that date until her arrival at her port of destination.

XXII. That the committee shall have full power to settle all claims on policies, and contingent expenses, and also to call general meetings of the association, which shall have authority to make, repeal, or alter or amend these or any subsequent rules or regulations for the government of the association; and the decision of the majority of such meetings shall be binding and conclusive on all the members, provided it does not affect ships having actually commenced a voyage or being under charter; in either of these cases such vessels to be exempt from the operation of any alteration until the completion of the voyage or expiration of the charter. At all general meetings members shall be entitled to one vote for each ship, but not exceeding in the whole five votes, and, if absent, may give their votes on each proposition by forwarding the same in writing under cover to the manager.

4. At the time of the making of the policy on the defendant's ship *Hope*, there were, including that ship, 160 vessels belonging to various owners upon which similar policies had been made by John Gray on behalf of the several members of the association, and which policies were at such time in full force.

5. On the 9th of April, 1861, a policy of assurance on the defendant's ship *Theodore* was made by the defendant and John Gray, and signed by John Gray on behalf of the several members of the association, whereby 1000*l.* was insured on the *Theodore* from noon of the 12th of April, 1861, to and with the meridian of the 20th of February, 1862.

6. This policy was in the same form, mutatis mutandis, as the policy on the *Hope*; and the regulations annexed to the policy on the *Theodore* were the same as the regulations annexed to the policy on the *Hope*.

7. At the time of the making of the policy on the *Theodore*, there were 160 other vessels, or about that number, belonging to various owners upon which similar policies for various amounts had been made between the owners and John Gray on behalf of the

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several members of the association, and which policies were at that time existing in full force.

8. John Gray continued to be the manager of the association until his death, which happened on the 11th of December, 1861.

9. On the 8th of January, 1862, a general meeting of the association was held, of which the defendant had notice. At that meeting the following resolution was passed:—"Resolved, that, in consequence of the death of the late manager, Mr. John Gray, his two sons, W. A. Gray, and Joseph Gray, be appointed by power of attorney to succeed him," &c.

9. After the passing of this resolution, a power of attorney was prepared, and executed by those persons who became or were members in February, 1862, and afterwards, to W. A. Gray and Joseph Gray, in terms similar to those of the power of attorney under which John Gray had acted.

10. The defendant was not a party to, nor did he ever execute, the last-mentioned power of attorney. On the 3rd of February, 1862, the defendant, by a letter addressed to John Gray & Sons, gave notice that he did not intend to renew the policies on the *Hope* and *Theodore;* and this intimation was repeated in a letter addressed by him to W. A. and J. Gray on the 1st of March, 1862.

11. On the 21st of January, 1862, the committee of the association "ordered a call upon the members of one-third of the estimated annual premiums, in accordance with the resolution passed at a general meeting." Notice of this call was sent to the defendant on the same day by the new managers, who claimed from him a balance on that account of 14*l.* 7*s.* 9*d.*, for which they drew upon him a bill, which he accepted and paid at maturity.

12. Further calls were made by the committee on the 6th of May, the 8th of July, and the 20th of November, 1862, and the new managers claimed from the defendant the sums mentioned in the particulars of demand on account of those calls, and drew bills upon him, which he declined to accept.

13. At the annual general meeting of the association, held on the 19th of February, 1863, a resolution was passed by which Andrew Gray was appointed as joint manager with Joseph Gray

in lieu of W. A. Gray; and in pursuance of that resolution W. A. Gray and Joseph Gray, on the 24th of February, 1863, in execution of the power of substitution in the power of attorney granted to them, by indorsement thereon substituted Andrew Gray's name for that of W. A. Gray.

14. The substituted attorneys are the plaintiffs in this action.

15. After the execution of this power of substitution, Andrew Gray acted as one of the managers of the association with Joseph Gray, and W. A. Gray ceased altogether to act as such manager.

16. The losses which the association became liable to pay were sometimes paid by transferring to the persons entitled to receive them the bills accepted by the members of the association for premiums and calls, and sometimes they were paid out of the common stock of the association.

17. The calls made upon the defendant for the amount of which this action is brought were made in respect of losses which occurred between the 20th of February, 1861, and the 20th of February, 1862, upon and in respect of the vessels insured in the association between those dates.

18. Before this action was commenced, the plaintiffs, as managers of the association, had paid for the association, either by transferring the acceptances of members for calls or premiums, or out of the common stock of the association, the whole of the losses in respect of which the calls were made on the defendant.

19. No vessel of the defendant's was insured in the association before the 20th of February, 1861, nor after the 20th of February, 1862; and between those dates only his vessels the *Hope* and the *Theodore* were insured in the association.

20. The Court were to have the same power of drawing inferences of fact that a jury would have.

The question for the opinion of the Court was, whether the plaintiffs were entitled to recover from the defendant.

Cohen, for the plaintiffs. The policy signed on behalf of the defendant, and the conditions indorsed thereon, make the moneys sued for a debt due from the defendant to the managers of the association; they were moneys which the plaintiffs were bound to pay, and which the defendant was compellable to pay, and therefore

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the payment was a payment made at his request. One question which will probably be raised is whether the defendant should not have been sued in equity: see *Bromley* v. *Williams*. (1)

[MONTAGUE SMITH, J. Have you any instance of an action at law being maintained against a member for contributions or calls.]

Gray v. *Gibson* (2) is one. The point was not taken there. The question was raised in the Court of Exchequer in *Redway* v. *Sweeting* (3), but not decided. The whole matter rests upon the construction of the rules of the association. If these do not enable the managers to sue the members, the only remedy is in equity. The managers having paid the money in the performance of their duty, and in discharge of a liability which the law casts upon the defendant, a request would be implied according to *Lampleigh* v. *Brathwait* (4). The fact of the payments having been made out of the moneys of the association can make no difference, they having been made in discharge of a liability of the defendant.

[WILLES, J., referred to *Hybart* v. *Parker* (5), where it was sought to enforce payment of calls in a cost-book mine by an action at the suit of the purser, by agreement.]

J. Brown, Q.C. (*Joyce* with him), for the defendant, was not called upon.

WILLES, J. I am of opinion that this action cannot be maintained, and for the simple reason,—a reason not applicable merely to the procedure of this country, but one affecting all sound procedure,—that the proper person to bring an action is the person whose right has been violated. Though there are certain exceptions to the general rule, for instance, in the case of agents, auctioneers, or factors, these exceptions are in truth more apparent than real. The persons who are suing here are mere agents, managers of an assurance association of which they are not members; and they are suing for premiums alleged to have become payable by the defendant in respect of policies effected by the plaintiffs for him, and for his share of contributions to

(1) 32 Beav. 177; 32 L. J. (Ch.) 716.
(2) Law Rep. 2 C. P. 120.
(3) Law Rep. 2 Ex. 400.
(4) Hob. 105.
(5) 4 C. B. (N. S.) 209; 27 L. J. (C.P.) 120. 4 Jur. N. S. 265

4 Sc. & Jur. N. S. 240

losses and damages paid by them to other members of the association whose vessels have been lost or damaged. The bare statement of the facts is enough to shew that the action cannot be maintained. When the defendant originally became a member of the association, he did not do so under any agreement or stipulation that the several members undertook to pay their premiums and contributions to the plaintiffs (or to their predecessor John Gray), in consideration of their acceptance of the office of managers. The plaintiffs are bare agents, who, in making the payments they did, were not bound to go beyond the funds of the association. They disbursed no money of their own; or, if they did so, it was not by the authority of the defendant. They were simply agents for the persons whose rights are alleged to have been violated, that is to say, of all the other members of the association except the defendant, or of the persons to whom the payments in respect of which they sue should have been made. It is, in effect, an attempt to substitute a person as nominal plaintiff in lieu of the persons whose rights have been violated. One of the latest attempts of the kind was the case of *Hybart* v. *Parker* (1), where it was sought to enforce an agreement between the adventurers in a cost-book mine that unpaid calls should be recovered as a debt due from the defaulting shareholder to the purser. The first sentence of the argument on behalf of the defendant in that case clearly shewed the fallacy of the attempt. "This," said the learned counsel, "is an attempt on the part of the shareholders in a cost-book mine, without the aid of an Act of Parliament, to appoint a public officer to sue and be sued on their behalf." The Court, adopting that view, gave judgment against the right of the purser to sue; and one member of the Court suggested that it was trenching upon the prerogative of the Crown, by making a new species of corporation, a corporation sole for the purpose of bringing actions. Williams, J., alludes to a suggestion made in the course of the argument, in order to get over the difficulty of want of consideration, that the plaintiff might have accepted the office of purser in consideration of the shareholders undertaking to pay their calls to him; but, in that case, the action must have been brought upon the special contract. The principle of that case is, I apprehend, precisely

(1) 4 C. B. (N. S.) 209; 27 L. J. (C.P.) 120.

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applicable here. Upon general principles, therefore, as well as upon authority, I am of opinion that this action is not maintainable.

MONTAGUE SMITH, J. This is an action brought by the plaintiffs to recover contributions or calls due not to them, but a body which they in the capacity of managers represent. There is no privity between the plaintiffs and the defendant. The contract is between the defendant and the other members of the association. The power of attorney,—assuming that the plaintiffs are properly substituted for John Gray,—enables them to sue, not in their own names, but in "the several and respective names" of the members of the association. This is an attempt to do that which has been frequently but fruitlessly attempted before, viz. to get rid of the difficulty of a large number of persons suing in their own names,—to appoint a public officer without obtaining an Act of Parliament or a charter of incorporation. Mr. Cohen suggests that the plaintiffs paid these calls under a legal or equitable liability, or at the request of the defendant. The moneys, however, which the plaintiffs paid were moneys of the association. The question, therefore, comes back to this, whether the plaintiffs are suing in their own right or as representatives of other persons. The latter seems to me to be the case, and consequently it is not competent to them to maintain the action.

BRETT, J. Mr. Cohen has argued that the plaintiffs are entitled to recover against the defendant on one of two grounds, either that they have paid money which he was legally bound to pay, or that he authorized them to pay it for him. Both propositions rest upon the fact that the plaintiffs paid money for the defendant. The statements in the special case shew that they have done no such thing. They have paid certain claims out of the funds of the association. It is clear, therefore, that the plaintiffs have not been compelled to pay money; and it is equally clear that they were not authorized by the defendant to pay money for him; and they have not in fact paid it. What the defendant is really sued for is, that the association have made certain calls upon him, and he has failed to pay them. This is, in truth, a contrivance by

which it is sought to avoid the necessity for resorting to a court of equity.

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Judgment for the defendant.

Attorneys for plaintiffs: *Elmslie, Forsyth, & Sedgwick.*
Attorneys for defendant: *G. & W. Webb.*

LORD CLIFFORD *v.* WATTS.

June 7.

Landlord and Tenant—Mining Lease—Covenant—Impossibility of Performance at Time of entering into Covenant.

The plaintiff, in consideration of the rent, &c., demised by deed to the defendant all the veins, pits, &c., of clay which were or might be found upon or under certain lands described, with liberty to enter and search for, dig, and carry away all such clay, making satisfaction to tenants for surface damage, To hold the said veins, pits, &c., of clay for twelve years from a given day, and to take the clay so authorized to be worked to his own use, Yielding and paying therefor during the term, in respect of all pipe and potter's clay being to be got or obtained from or under the land, 2*s.* 6*d.* per ton. Covenants for compensation for damage to the land, and for restoring the surface, keeping accounts of clay raised, &c.,—a covenant to work and make trials for clay according to the best and most improved method of working clay-pits, and the usual course of proceeding in such works with effect,—and a covenant that the defendant would dig and remove from the land an aggregate amount of not less than 1000 tons, nor more than 2000 tons of pipe or potter's clay in each year of the term. There was no reservation of a minimum rent to be paid in the event of clay not being found or raised.

In an action upon this deed, one of the breaches assigned was that the defendant had not dug an aggregate amount of not less then 1000 tons of pipe and potter's clay in each year of the demise that had elapsed.

Plea, on equitable grounds, that the defendant could not at any time during the term dig an aggregate amount of not less than 1000 tons of pipe and potter's clay in each year, because there was not at the time of the demise, nor at any time since, so much clay under the land in question, and the performance of the covenant was impossible, and such impossibility was, at the time of making the covenant, unknown to the defendant, and he had no reasonable means of ascertaining it:—

Held, on demurrer, that the plea was an answer to the breach, as the Court were of opinion on the construction of the deed, that it was the intention of the parties that the covenant to dig not less than 1000 tons of clay in each year should not take effect unless there was clay to that amount in the land demised.

DECLARATION that the plaintiff and the defendant made and executed a deed, which was as follows:—

This indenture made the 28th of June, 1862, between Lord Clifford, of the one part, and W. J. Watts, of the other part, witnesseth that Lord Clifford, in con-

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sideration of the rent, duties, payments, covenants, and agreements hereinafter contained on the part of Watts to be paid, &c., hath demised, leased, &c., unto Watts, all and singular the mines, veins, pits, and holes of clay, as well of the description of pipe as of potter's and other clay, which now are or shall or may hereafter be found or be upon or under the lands and hereditaments of Lord Clifford hereinafter particularly mentioned, in Kingsteignton, Devon, that is to say, &c. (describing four several fields), together also with full and free liberty, &c., for Watts, &c., to enter into and upon such lands, &c., and there to open, dig, search for, gain, raise and get up and take and carry away all such pipe, potter's, and other merchantable clays in and from the said lands, and for that purpose to dig and make pits, &c., and likewise full and free liberty of ingress, egress, &c., &c., making such reasonable satisfaction as hereinafter is mentioned to the tenants of the said lands for such trespass or other damage as shall be occasioned thereon in consequence of the grant or liberties hereinbefore contained, To have, hold, &c., the said veins, &c., of pipe and potter's or other description of clay, with the several powers, &c., hereby granted, &c., unto Watts from the 29th of September last past for and during the term of twelve years thence next ensuing; and to have and to hold all and every the said beds or veins of clay, as well of the description of pipe as of potter's and other qualities of clay, that shall be found and raised within the term aforesaid out of any part of the lands so authorized to be worked as aforesaid, unto Watts, &c., and as his and their own proper goods and chattels: Yielding and paying therefor during the said term unto Lord Clifford in respect of all pipe and potter's clays being to be dug, got, or obtained from or under the surface of any of the lands, the sum of 2*s.* 6*d.* per ton, and so on in proportion for any greater or less quantity, and in respect of clay not answering to the description of pipe or potter's clay, but denominated seggers or aluminal or drain clay, being to be so dug, &c., the sum of 6*d.* per ton weight,—the same to be respectively paid and payable at the end of each half-year accruing next after the commencement of the term hereby granted; And further yielding and paying unto Lord Clifford at the expiration or other sooner determination of the term, the sum of 100*l.* for every acre of land which, having been worked for clay under this demise, shall not be effectually restored for agricultural purposes, and so in proportion for any less quantity than an acre: And Watts, &c., doth hereby covenant, &c., with Lord Clifford, that he, Watts, will pay to Lord Clifford the several dues, &c., so respectively made payable as aforesaid, free and clear of all rates, taxes, &c.; and also shall and will cause all the merchantable clays which shall be got from the lands of Lord Clifford pursuant to the above-mentioned grant or demise to be carted or removed to and deposited in the cellars or warehouses built for the reception of the same alongside the Kingsteignton canal, from thence to be conveyed along the canal down to the port of Teignmouth, under payment of the accustomed dues and charges; and also that Watts doth further agree to make full satisfaction to the tenants or lessees of lands into and upon whose several tenements, or parts thereof, entries shall be made for the purpose of opening clay-pits with the view of getting and removing clay therefrom, in the proportions following, that is to say, for the opening of any fresh or new pit towards the working and getting of such clay, the sum of 10*s.*, to be paid to such tenant or occupier at the time of breaking the soil towards the sinking of any such pit, and that he, Watts, shall become and be the actual occupier and

renter of such close of land at and under the yearly rent of 3*l.* per acre, and so in proportion for any less quantity than an acre, payable half-yearly, if required, to such tenant or occupier; And likewise that he, Watts, shall work and make trials for clay in, through, and underneath the said lands of Lord Clifford according to the best and most improved methods of carrying on and working clay-pits, and the usual course of proceeding in and continuing such works with effect, and shall and will form and work the said clay-pits as near together as possible, so as to cause the least possible waste or loss of clay, and shall and will get and raise and remove all the clay from the pits so to be opened as aforesaid, or that can possibly be excavated therefrom, in such perfect manner that none of such clays be left remaining therein, except so much of the commoner clays as will be necessary for the secure workings of the pits; and also shall, when about to open any new pit or pits, carefully remove the top stratum or bed of soil as far as the same may be found useful or serviceable for the purpose of vegetation, and cause the same to be laid aside in distinct heaps, in order to be again strewed upon the surface; And also that he, Watts, shall, after the opening and digging the whole of the clays out of the several pits so to be worked in pursuance of the powers hereby granted cause the same in reasonable time afterwards to be filled in and levelled in the usual and customary manner, so far as the gravel and other unserviceable earth or clay so thrown aside will admit of and they be enabled so to do, and on the surface of the said soils so to be used shall and will strew the earth or soil which at the opening of each such pit shall have been so thrown aside or laid in heaps pursuant to the last-mentioned covenant in that behalf; And also that he, Watts, shall safely convey down from the surface into all or any of the clay-pits so to be dug and worked, such persons as Lord Clifford or his agent shall at any time name for the purpose, and examine whether the same are worked in a fair and workmanlike manner, &c.; and shall not let, set, &c., any part of the demised premises without the consent in writing of Lord Clifford, &c.; And also that he, Watts, his executors, &c., shall and will dig, or cause and procure to be dug and removed from the lands of Lord Clifford, his heirs, &c., in pursuance of the grant or demise hereby made, an aggregate amount of not less than 1000 tons, nor a larger quantity than 2000 tons, of pipe or potter's clay in each and every year of the term hereby granted. Then followed a covenant to keep and produce books of account, &c., a proviso for re-entry in case of default in payment of the 2*s.* 6*d.* and 6*d.* per ton in respect of all merchantable clay got from any of the lands demised, or in making satisfaction for surface damage, and a covenant for quiet enjoyment.

First breach,—that the defendant had not made trials for clay according to his covenant.

Second breach,—that the defendant had not dug an aggregate amount of not less than 1000 tons of pipe and potter's clay in each year of the demise that had elapsed, by reason whereof, &c.

Pleas, to the first breach, payment into court of 40*s.* To the second breach, for defence on equitable grounds, that the defendant could not at any time during the period of the said term, dig an

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aggregate amount of not less than 1000 tons of pipe and potter's clay in each year of the demise, according to his covenant, because there was not at the time of the demise, nor had there been at any time since, existing upon or under the said lands upon or under which the defendant was entitled to dig by virtue of the deed, 1000 tons of pipe and potter's clay or either of them within the meaning of the covenant; and the performance of the said covenant by the defendant had always from the time of the making thereof been impossible; and at the time of the making of the said covenant such impossibility was unknown to the defendant, and he had no reasonable means of knowing or ascertaining the same.

Replication to the first plea, damages ultrà. Joinder of issue on the second plea, and demurrer. Joinder.

Kingdon, Q.C. (*Trevelyan* with him), in support of the demurrer. The effect of the indenture is to demise the clay under the lands in question, with a licence to dig and work it. There being no minimum rent reserved by the deed, the plaintiff can get no compensation for what he grants unless he can obtain it under the covenant which forms the subject of the second breach in the declaration. Whether it be regarded in a legal or an equitable point of view, the covenant is a positive engagement on the part of the defendant that he will dig or cause to be dug an aggregate amount of not less than 1000 tons of pipe or potter's clay in each year of the term, or pay the stipulated amount of royalty; and it is no answer for him to say that there was no clay to be dug: *Barker* v. *Hodgson* (1); *Marquis of Bute* v. *Thompson* (2); *Hills* v. *Sughrue* (3); *Hale* v. *Rawson.* (4) This is merely a mode of stipulating for a minimum rent. In *Taylor* v. *Caldwell* (5) the parties were contracting with reference to a state of things in existence at the time the contract was made, and therefore that case has no material bearing on this. But Blackburn, J., in the course of the judgment, says (6): "There seems no doubt that, where there is a positive

(1) 3 M. & S. 267.
(2) 13 M. & W. 487.
(3) 15 M. & W. 253.
(4) 4 C. B. (N. S.) 85; 27 L. J. (C.P.) 189.
(5) 3 B. & S. 826; 32 L. J. (Q.B.) 164.
(6) 3 B. & S. at p. 833; 32 L. J. (Q.B.) at p. 166.

contract to do a thing not in itself unlawful, the contractor must perform it or pay damages for not doing it, although, in consequence of unforeseen accidents, the performance of his contract has become unexpectedly burthensome, or even impossible." The cases in equity all tend to shew that this plea would be no answer in equity: see *Smith* v. *Morris* (1); *Phillips* v. *Jones* (2); *Ridgway* v. *Sneyd.* (3)

Joshua Williams, Q.C. (*H. T. Cole, Q.C.*, with him), contrà. The object of the covenant in question was merely to regulate the mode of working the clay, if any existed, not to operate as a reservation of a minimum rent, to be paid whether there was clay or not. In the absence of clay, there was nothing upon which the covenant could operate. The circumstance of the deed containing no power for the defendant to determine it before the expiration of the twelve years shews that it was meant to expire when there was no longer any merchantable clay to work. Though the substance of the contract in *Marquis of Bute* v. *Thompson* (4) was the sale of coal, a fixed rent was reserved, which was payable whether coal was worked or not. In Com. Dig. Covenant (F.) it is said: "If the foundation of a covenant fails, the covenant also fails." So, in Pothier on Obligations, vol. i. p. 79, citing l. 85, *ff.* de Reg. Jur., it is said: "For an act to be the object of an obligation, it is necessary that it should be possible; for, impossibilium nulla obligatio est.' Again, in Sheppard's Touchstone, p. 164, 7th ed., it is said: "If the thing to be done by a covenant be in the nature of it impossible, the covenant is void; and therefore it is that, if a man covenant to go to Rome in three days, or the like, the covenant is void." But Mr. Preston adds: "A condition is void when it stipulates for an act which is impossible; but it should seem that, if a man covenant to do an impossible act, as, to go to Rome in twenty-four hours, an action may be maintained upon the covenant, though the damages may be merely nominal." All the cases cited on the other side are distinguishable in this, that the thing contracted to be done was not impossible. *Quarrington* v. *Arthur* (5) is in favour of the

(1) 2 Bro. C. C. 311.
(2) 9 Simons, 519.
(3) Kay, 627.
(4) 13 M. & W. 487.
(5) 10 M. & W. 335.

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defendant's view. Where a covenant becomes impossible of performance by the act of God or the act of the law, the covenantor is excused: *Doe* d. *Marquis of Anglesea* v. *Churchwardens of Rugely* (1); *Taylor* v. *Caldwell.* (2)

Kingdon, Q.C., in reply.

WILLES, J. This is an action upon a demise or grant by Lord Clifford to Watts of certain mines, pits, &c., of clay, by which demise the rent was made payable at a certain rate per ton upon the clay raised: and the indenture contained, amongst others, a covenant that Watts shall work and make trials for clay under the lands in question. The first breach is founded upon that covenant; and in respect of that the defendant has paid 40*s.* into court. The indenture also contains a covenant that Watts shall dig and raise from the land an aggregate amount of not less than 1000 tons, or more than 2000 tons, of pipe or potter's clay in each year of the term. The term granted was twelve years; and for the pipe or potter's clay the defendant was to pay a royalty of 2*s.* 6*d.* per ton. The breach assigned on that covenant is that with which we have to deal on this occasion: it is, that the defendant has not dug an aggregate amount of not less than 1000 tons of pipe and potter's clay in each year of the demise. The plea, the validity of which is now in question, is, that the defendant could not dig 1000 tons of clay each year according to his covenant, because there was not at the time of the demise nor since existing under the lands 1000 tons of such clay, that the performance of the covenant had always been impossible, and that such impossibility was unknown to the defendant at the time, and he had no reasonable means of knowing or ascertaining the same. To that plea there is a demurrer. It is obvious that this plea may be considered from two points of view. First, with reference to the abstract question whether a covenant to perform an impossibility is or is not valid in point of law,—whether the covenantor can set up such impossibility from the beginning as an answer to a breach, or must pay damages, which, according to Mr. Preston (3), may only be nominal. The second, and with reference to this case the

(1) 6 Q. B. 107. (2) 3 B. & S. 826; 32 L. J. (Q.B.) 164.
(3) Shep. Touch. by Preston, 7th ed. 164.

most important, consideration appears to me to arise from the question whether the defendant has by this covenant contracted to perform an impossibility, or whether the true meaning of the covenant, construing it by the rest of the deed, is, not that the defendant undertakes to get the stipulated quantity of clay whether it be there or not, or to pay the stipulated tonnage as if the clay had been raised, but rather, dealing with it as subsidiary to the main object of the demise, that he will raise such pipe or potter's clay as may be found under the land, at the rate and price specified. If the latter be the true construction of the covenant, it is not an independent covenant to do the thing contracted for, whether possible or not, but only a stipulation as to the rate at which that is to be done which both parties at the time contemplated. According to that construction of the covenant, the plea is a good defence to the second breach. And this is the view to which, after the best consideration I am able to bring to the case, and after having heard the very learned arguments on both sides, my opinion inclines.

The deed, without any recital, witnesses that Lord Clifford, in consideration of the rent, payments, covenants, &c., demised to Watts the mines, pits, &c., of clay under certain lands particularly described. It then proceeds to grant Watts a license to enter upon the land to dig and search for clay and to make pits, &c., with rights of way for carrying it away, &c., subject to compensation for damage. Then comes the habendum,—to have, hold, &c., the said mines, &c., of pipe and potter's or other clay, with the powers thereby granted, for twelve years; and to have and to hold all and every the said beds or veins of clay that shall be found and raised within the term out of any part of the land so authorized to be worked, unto Watts, his executors, &c., unto his and their own use. So far we are dealing with the demising part of the instrument, which refers to specific lands and to specific clay which is believed by both parties to be under the lands described at the time. The whole scope of the contract is that the defendant shall take that clay. Whether the speculation would turn out to be a profitable one to the tenant or not was uncertain. So far it was natural that he should take the risk. But the question is whether we are

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justified in importing another element into a bargain like this, viz. a warranty by the tenant that clay shall be found, or an undertaking to pay for the quantity stipulated for whether found or not. The provision for payment follows in the reddendum, by which Watts is to pay Lord Clifford, "in respect of all pipe and potter's clay being to be dug, got, or obtained from or under the surface of any of the lands, 2*s.* 6*d.* per ton," and 6*d.* per ton for other clay, to be paid half-yearly; and Watts was further to pay 100*l.* per acre for any land which, having been worked, should not be restored to a state fit for agricultural purposes. The indenture then proceeds in the ordinary way to the covenants on the part of the tenant. Watts covenants with Lord Clifford for payment of the rent, and that he will cause all the clay raised to be conveyed by a certain canal at rates provided for by the lease. Then follow covenants for making satisfaction for surface damage, and for payment of a kind of rent to the tenants for land required for the working of the pits; a covenant that Watts will during the continuance of the term work and make trials for clay in and under the land according to the best and most improved methods, &c., which is the subject of the first breach. Then comes a covenant that the lessee will do the least possible damage to the land, after which follows the covenant in question,—and also that Watts, his executors, &c., shall dig and remove from the land demised "an aggregate amount of not less than 1000 tons, nor a larger quantity than 2000 tons, of pipe or potter's clay in each and every year of the term hereby granted." Then comes a covenant to keep accounts of all clay raised: and the remainder of the deed may be dismissed with this observation, that there is no stipulation that the tenant shall pay any sleeping rent or minimum rent, or any rent in the event of no clay being raised during the term, or not being there to be raised, nor any provision for putting an end to the term in case the clay should be exhausted. The result to my mind is, that the covenant upon which the second breach is assigned is one of a series of subsidiary covenants introduced for the purpose of carrying out the substantial object and intention of the parties, viz. that Watts should have the right during the term of working out all the clay under the land, and pay for it at the

prices specified per ton; and this subsidiary covenant deals with the rate at which the clay is to be worked out. The bare statement of the provisions of the deed leads me to the conclusion that the tenant never intended to warrant that there was clay upon the land, and that neither party contemplated that he should, in the event of no clay being found there, at all events pay a minimum fixed rent during the term. It is a bare stipulation as to the rate of payment for the clay which should be raised. That appears to me to be the natural and ordinary construction of the covenant when read by the light of the context. It turned out that there was no clay of the descriptions mentioned on the land. The covenant, therefore, became inapplicable, and has not been broken.

It may be that the allegations in the plea are untrue. That, however, we are precluded from considering: for the purpose of the demurrer, we must assume the plea to be true. It may be that the defendant has taken upon himself the burthen of searching for clay, and of proving at the trial that he has searched so effectually that clay must have been discovered if it had existed, and so establishing the impossibility of performance of this covenant by reason of there being no clay to be found. But, for the purpose of the construction of the covenant, we must assume that there was none. Cases may be conceived in which a man may undertake to do that which turns out to be impossible, and yet he may still be bound by his agreement. I am not prepared to say that there may not be cases in which a man may have contracted to do something which in the present state of scientific knowledge may be utterly impossible, and yet he may have so contracted as to warrant the possibility of its performance by means of some new discovery, or be liable in damages for the non-performance, and cannot set up by way of defence that the thing was impossible. But, before we arrive at such a conclusion, we must be satisfied, if no other reasonable construction suggests itself, that the party really did intend to warrant that to be possible which was impossible. The authorities relied on for the plaintiff appear to me to be cases where a man either undertook to do a thing which was possible at the time, but which without any fault of his adversary

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became afterwards impossible, or where he, notwithstanding the thing was impossible of performance, took upon himself to warrant that it should be possible. *Barker* v. *Hodgson* (1) was a case where the charterer of a ship had covenanted to send a cargo alongside at a foreign port, but, in consequence of the prevalence of an infectious disorder at the port, all public intercourse was prohibited by the authorities of the place; and yet he was held to be responsible in damages for the non-performance of his covenant. If the intercourse with the foreign port had been prohibited by the law of this country, the act would have been illegal, and the defendant would have been excused, not because he could not, but because he ought not to do it. But, where the performance of the thing covenanted to be done is not made impossible by the law of this country, the case falls within the principle laid down in the leading case of *Paradine* v. *Jane* (2), where the defendant, in an action for rent, sought to excuse himself by reason of his having been expelled from the premises by alien enemies, and his plea was held insufficient. The material resolution of the Court was, that "where the law creates a duty or charge, and the party is disabled to perform it, without any default in him, and hath no remedy over, there the law will excuse him;" but, "when the party by his own contract creates a duty or charge upon himself, he is bound to make it good if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract; and, therefore, if the lessee covenant to repair a house, though it be burnt by lightning, or thrown down by enemies, yet he ought to repair it." Where a thing becomes impossible of performance by the act of a third person, or even by the act of God, its impossibility affords no excuse for its non-performance: it is the defendant's own folly that has led him to make such a bargain, without providing against the possible contingency. In the present case, if the allegations in the plea be true, there was nothing upon which the covenant could attach at the time it was entered into. *Hills* v. *Sughrue* (3) has no application, for another reason. There, the charterer by his contract warranted that, the

(1) 3 M. & S. 267. (2) Aleyn, 26.
(3) 15 M. & W. 253.

ship being ready to take a cargo of guano at Ichaboe, he would there provide her with a full cargo. The impossibility of obtaining a cargo there was no excuse for the non-performance of his contract. That case, therefore, falls within the second category of cases, where the defendant had warranted the possibility of doing the thing contracted for. It remains only to deal with *Marquis of Bute* v. *Thompson*. (1) There, by the express terms of the contract, the lessee covenanted absolutely to raise a given quantity of coal in each year, or to pay a minimum rent which should represent the minimum amount of coal agreed to be worked: and, the lessee failing to raise the stipulated quantity of coal, he was held bound at all events to pay the minimum rent. The judgment of the Court is very short, and, but for the facts, might possibly be taken to bear the construction put upon it by Mr. Kingdon, viz. that the lessee was bound to perform his covenant whether there was coal to be found or not. The judgment, however, must be read with reference to the subject-matter with which the Court was dealing; and, so reading it, it is plain that the Court construed the covenant, not as a stipulation exhausting itself upon the first branch as to the raising of the coal, but as an alternative covenant to secure the lessor at all events a minimum rent during the term, whether or not coal was worked or was there to be worked. There is, however, no such covenant here. There is only a covenant to work out all the clay under the land, and this covenant was not broken by the defendant's failure to work clay if none was to be found there. I therefore think the defendant is entitled to judgment.

MONTAGUE SMITH, J. I am of the same opinion. The result of a decision in favour of the plaintiff would be to give him a fixed minimum rent when he has not covenanted for it; I do not, however, express any opinion as to what would be the measure of damages for a breach of this covenant. Taking the whole of the deed together, I confess I do not think it admits of such a construction. Seeing the part of the indenture in which the covenant in question is found, it seems to me that it means no more than it

(1) 13 M. & W. 487.

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expresses by necessary implication, viz. that the lessee shall work a given quantity of clay, if clay be found in the land. It is the clay in the land which is the subject of the grant. Any other construction would, I think, defeat the apparent intention of the parties. The covenant is based on the assumption that there was clay there. It was impossible to perform it unless there was; and the covenantor did not undertake to perform an impossibility, but merely to dig and remove such clay as should be found in the land, to the extent stipulated for. If there was nothing upon which the covenant could attach, it fails. There is nothing in the deed which amounts to a warranty. The whole scope of it was that the plaintiff should receive a royalty on the clay, if found. If the failure to find clay of the description mentioned was the result of the defendant's omission to make proper searches, the grantor has his remedy. My Brother Willes has so fully gone into the several covenants in the deed, and distinguished the cases cited from the present, that I do not think it necessary to say more. I will merely add that, in the case of *Marquis of Bute* v. *Thompson* (1), there was a covenant for a minimum rent, whether coal was got or not. That rent was clearly payable whether the coal existed or was searched for or not. There is no such covenant here. In truth, the plaintiff is seeking by this action, so far as the second breach is concerned, to get something he has not contracted for.

BRETT, J. I think it is not competent to a defendant to say that there is no binding contract, merely because he has engaged to do something which is physically impossible. I think it will be found in all the cases where that has been said, that the thing stipulated for was, according to the state of knowledge of the day, so absurd that the parties could not be supposed to have so contracted. But here both parties might well have supposed that there was clay under the land. They agree on the assumption that it is there; and the covenant is applicable only if there be clay; it does not amount to a warranty on the part of the grantee that there was clay, or to an engagement to pay the royalty although it should turn out that there was none. I will

(1) 13 M. & W. 487.

merely add a word upon the case of *Hills* v. *Sughrue*. (1) There, the contract was that the ship should proceed to Ichaboe, and the charterer engaged to furnish there a full cargo of guano. There was nothing unreasonable or unusual in such a contract; and it was clearly no answer for the charterer to say that there was no guano at the island when the ship arrived there. I agree that there must be judgment for the defendant.

Judgment for the defendant.

Attorneys for plaintiff: *Ward, Mills, & Witham.*

Attorney for defendant: *J. Yarde, for Whidborne & Tozer, Teignmouth.*

DE NICHOLLS *v.* SAUNDERS AND ANOTHER.

June 23.

*Landlord and Tenant—Mortgage—Payment of Rent to Mortgagor before it becomes due—*4 *Anne, c.* 16.

B., having leased his land to the plaintiff at a rent payable quarterly, subsequently mortgaged the land to the defendants, who allowed B. to remain in receipt of the rent. Subsequently to the mortgage, B. applied to the plaintiff, who was not aware of the mortgage, to pay him a year's rent in advance, and the plaintiff did so. After the payment, and before the rent had become due, the defendants gave notice to the plaintiff to pay the rent to them, and the plaintiff refusing to pay it, the defendants distrained for it:—

Held, in an action for an illegal distress, that payment of the rent before it became due was not a good payment as against the defendants, the mortgagees, and that the plaintiff was still liable to pay them the rent.

ACTION for wrongful entry and wrongful distress. By consent, and by order of Keating, J., the following case was stated without pleadings for the opinion of the Court:—

1. On the 1st day of May, 1865, Charles Bauman held the houses and premises Nos. 15 and 17, Glasshouse Street, in the county of Middlesex, as the lessee in possession under a lease from Leonard Wild Lloyd to Bauman for the term of fifty-five and a quarter years from the 24th day of June, 1864, the ultimate reversion in fee of such premises expectant on the determination of such lease, and of divers other mesne leases thereof, then and still being vested in the Crown.

(1) 15 M. & W. 253.

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2. By an indenture of lease dated and made the 1st day of May, 1865, and made between Bauman of the one part, and the plaintiff of the other part, Bauman, then being possessed of the premises by virtue of the first-mentioned lease, demised the same to the plaintiff for the term of fifty-five years from the 24th day of June, 1864, at the rent of 150*l.* payable for the first three-quarters of a year, and the yearly rent of 330*l.* for and during all the residue of such term, such rents being reserved and made payable by equal quarterly payments on the four usual quarter-days, and the plaintiff entered on the premises forthwith by virtue of such demise, which is still subsisting and in full force.

3. By an indenture of demise dated and made the 21st day of June, 1865, and made between Bauman of the one part, and the defendants of the other part, Bauman demised the premises to the defendants for the residue of the term of fifty-five and a quarter years from the 24th day of June, 1864, less ten days, by way of mortgage for securing to the defendants the payment of 1900*l.* and interest.

4. The defendants did not give the plaintiff any notice, nor did he know of such mortgage, nor that Bauman had in any way mortgaged, charged, or incumbered the premises, or the rents thereof, or his interest therein, until after the 12th day of March, 1869 (when the plaintiff made the payment hereinafter mentioned), nor did the plaintiff ever attorn to the defendants, or agree to pay to them the rent reserved by the lease from Bauman to the plaintiff.

5. The plaintiff continued to occupy the premises under the lease from Bauman, and to pay him the rent thereby reserved as it became due down to and inclusive of Christmas, 1868.

6. On the 12th day of March, 1869, Bauman (representing that he was in temporary need of cash) requested the plaintiff to pay to him at once the two quarters' rent which would next become due—that is to say, the rent for the quarter which would expire on the 25th day of March then instant, and the rent for the quarter which would expire at Midsummer, 1869; and the plaintiff, believing that Bauman remained fully entitled to receive the rents of the premises, then paid him a sum of 165*l.*, being the amount of, and being intended by the plaintiff to cover, the two quarters' rent

accordingly, and Bauman at the same time handed to the plaintiff his written receipt and discharge for the sum.

7. On the 24th day of March, 1869, the defendants' solicitors sent to the plaintiff the following letter:—

"Sir,—On behalf of the mortgagee from Mr. C. Bauman of the premises in your occupation we hereby give you notice to pay to us the rent accrued and to accrue due in respect thereof, and you will be liable to proceedings if you pay the same to any other person.

"Your obedient servants,

"Routh & Stacey.

8. This was the first notice, intimation, or knowledge which the plaintiff received or had of Bauman having mortgaged, charged, or incumbered the premises, or the rents thereof, or his interest therein, and by the plaintiff's instructions his solicitor immediately sent the following reply:—

"Dear Sirs,—My client, Mr. De Nicholls, has called on me on the subject of your letter of this day's date. It appears that recently, at the request of Mr. Bauman, he paid him half a year's rent up to Midsummer next. It is a pity your client did not give notice of his mortgage.

"The receipt for the rent is with me, if you would like to see it.

"Yours truly,

"E. Tyrrell Lewis."

9. Bauman was duly adjudicated a bankrupt on the 25th of March aforesaid.

10. Bauman made default in payment of the principal money and interest secured by the mortgage, and the defendants became entitled to the possession of the premises, and to the receipts of the rents thereof, as against Bauman.

11. The defendants claiming to be entitled to receive from the plaintiff the rent for the quarter expiring at Lady Day, notwithstanding the payment by the plaintiff to Bauman of the sum of 165*l.* (under the circumstances hereinbefore mentioned), and the plaintiff refusing to pay the amount of the said quarter's rent to the defendants, the defendants, on the 4th day of June, 1869, caused a distress to be levied on the plaintiff s goods on the pre-

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mises for the amount of such quarter's rent and the costs of distress, and the plaintiff forthwith and by the authority of the defendants paid the amount distrained for to the defendants' brokers under protest, viz. 82*l.* 10*s.*, amount of rent claimed, and 4*l.* 7*s.* 6*d.*, costs of levy, making in the whole 86*l.* 17*s.* 6*d.*, and the brokers withdrew from possession.

12. The distress was in all respects legally made, and the defendants were at the time thereof legally entitled to make the same, unless and in so far as the plaintiff's previous payment to Bauman under the circumstances hereinbefore mentioned may have rendered the same illegal.

13. On the 22nd day of June, the plaintiff commenced this action against the defendants for making such distress.

The Court was to have power to draw inferences of fact, and the question for the opinion of the Court was, whether the distress was lawfully made for the rent of the quarter expiring at Lady Day, 1869.

Mellish, Q.C. (*Lucius Kelly*, and *G. F. Blake*, with him), for the plaintiff. Prior to the statute 4 Anne, c. 16, the assignee of a reversion could not recover the rent until the tenants had attorned to him; that statute took away the necessity for attornment, but expressly provided, by s. 10, that "no tenant shall be prejudiced or damaged by payment of any rent to any such grantor or conusor, or by breach of any condition for non-payment of rent before notice shall be given to him of such grant by the conusee or grantee." The real question is, whether this section renders such a payment as was made in this case valid as against the mortgagee. In *Moss* v. *Gallimore* (1) Lord Mansfield said: "Since the statute the conveyance is complete without attornment, but there is a provision that the tenant shall not be prejudiced for any act done by him as holding under the grantor till he has had notice of the deed. Therefore the payment of rent before such notice is good." And in *Pope* v. *Biggs* (2), in which that case is referred to, Bailey, J., said: "At common law the attornment of the tenant would have been necessary to entitle the mortgagee to

(1) 1 Doug. 279, 282.

(2) 9 B. & C. 245, 252.

the rents; but the effect of the statute 4 Anne, c. 16, ss. 9, 10, is to place a tenant, as soon as he has notice of the mortgage deed, in the same situation as if he had attorned to the mortgagee, with this exception, that he is not to be prejudiced by any act done by him as holding under the grantor until he has had notice of the mortgage deed." The plaintiff will be prejudiced if he has to pay this rent over again to the defendant. *Lumley* v. *Hodgson* (1) is to the same effect. It must be admitted that these cases still leave open the question, whether the payment by the plaintiff to Bauman can be considered a payment of rent, and that *Clun's Case* (2) is rather against the plaintiff.

Manisty, Q.C. (*Day* with him), for the defendants, was not called on.

WILLES, J. It is impossible in this case to give judgment otherwise than for the defendants. The question is, whether, where there has been an assignment of a reversion, payment of rent to the assignor before rent-day takes away the rights of the assignee to the rent so completely, that if he should give notice before rent-day of the assignment the payment would still be good. There would be an obvious injustice in that even if the payment were made before the assignment, because a person who bought the reversion on the faith that the rent was becoming due would be defeated by a transaction between the landlord and tenant of which he had no notice. But that would not be so strong a case as this, because a release by the landlord of all rent before assignment would be good against an assignee of the reversion; but this is a case in which a person gets an assignment of the reversion, and obtains a right to give notice to the tenant to pay the rent to him before payment is made to the assignor, and in which, therefore, the landlord had no power to accept payment or give a release at the time the payment was made. It is clear that the common law authorities which say that payment before notice is good against a mortgagee, and which are represented by *Watts* v. *Ognell* (3), have no application to the present case; they apply only to a person fulfilling his obligation to one who, at the time it is fulfilled, is the apparent reversioner: which is similar to payment to a creditor who has

(1) 16 East, 99. (2) 10 Rep. 127. (3) Cro. Jac. 192.

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assigned the debt without notice to the debtor. These cases depend upon a rule of general jurisprudence not confined to choses in action, though it seems to have been lost sight of in some recent cases—viz. that if a person enters into a contract, and, without notice of any assignment, fulfils it to the person with whom he made the contract, he is discharged from his obligation; that is a rule which is declared rather than enacted by 4 Anne, c. 16, s. 10. That statute did away with the necessity for attornment, but protected the tenant in cases where he had paid the rent due from him before notice of the assignment; this provision of the statute, however, clearly applies to the fulfilment of an obligation to pay rent imposed by the lease. There has been no such payment here, for payment of rent before it is due is not a fulfilment of the obligation imposed by the covenant to pay rent, but is, in fact, an advance to the landlord, with an agreement that on the day when the rent becomes due such advance shall be treated as a fulfilment of the obligation to pay the rent. The receipt of the rent could not be treated here as a discharge by the landlord, because by assigning the reversion before the rent was received by him he had parted with the power of giving such a discharge. The plaintiff lent his money on a contract, which was under an implied condition that the landlord should continue entitled to the rent at the time it became due, and able, therefore, then to give the plaintiff a valid discharge.

KEATING and MONTAGUE SMITH, JJ., concurred.

Judgment for the defendants.

Attorney for plaintiff: *E. T. Lewis.*
Attorneys for defendants: *Routh & Stacey.*

LEATHLEY AND OTHERS *v.* SPYER.

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June 28.

Guarantee—Renewal—Construction with reference to surrounding Circumstances —Partner—Broker at Lloyd's.

J. S. being desirous of carrying on business as an insurance-broker at Lloyd's, which by the rules of that association he could only do on being admitted a subscriber and giving security to the committee of Lloyd's, the defendant and another person, in March, 1858, addressed the following letter to the committee:—"We each of us hereby hold ourselves responsible to the extent of 750*l.* for any debts that J. S. (who has applied to your committee to be admitted a subscriber of your institution, to enable him to act as an insurance-broker,) may contract in his capacity of such broker," for two years from this date, and till notice. J. S. was therefore admitted and acted as a broker on his own sole account until January, 1860, when he took H. into partnership, with the knowledge of his sureties.

In April, 1860, the defendant and his co-surety gave notice to the committee for the discontinuance of the guarantee; but, upon being informed that J. S. could not be allowed to remain a member of Lloyd's without security, they, on the 17th of that month, addressed the committee as follows:—"The letter we addressed to you under date of the 11th instant, notifying the putting an end to our guarantee dated 24th March, 1858, on behalf of J. S., we now hereby withdraw, and declare that such guarantee shall continue in force upon the same terms and conditions as are mentioned in such guarantee."

By the rules of Lloyd's one member only of a firm is allowed to act as a broker; but he may obtain a "substitute's ticket," which enables his substitute to contract for him in the house. In January, 1862, J. S. appointed H. his substitute, and H. as such substitute entered into contracts with underwriting members of Lloyd's. All the contracts made after April, 1860, whether by J. S. or his substitute, were made in the name and on account of the partnership. Many of these contracts resulted in debts due to members of Lloyd's from the partnership:—

Held, that the guarantee was to be construed with reference to the circumstances existing in April, 1860, that it included therefore all transactions by J. S. in his capacity of broker, after April, 1860, whether by himself personally or by H. as his substitute, and whether for his own sole benefit or for the benefit of the firm; and consequently that the defendant was liable under the guarantee for these partnership debts.

SPECIAL case in an action brought to recover moneys alleged to be payable by the defendant to the plaintiffs under a guarantee given by the defendant in respect of any liabilities to be contracted, as hereinafter mentioned, by one James Spyer to the members of Lloyd's.

1. The plaintiffs are members of Lloyd's, and constituted the committee appointed to manage the affairs of Lloyd's for the year 1860. The defendant is an attorney.

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2. Lloyd's is an association composed of three classes of subscribers, viz. the underwriting members, the non-underwriting members, and the annual subscribers.

3. The management of the institution is vested in a committee of members, who have power to require persons applying to be admitted as annual subscribers to give security, as was done in the case of James Spyer under the circumstances hereinafter appearing, and who also are impowered to decline to renew the subscription of any annual subscriber, and thus to prevent him from entering the room or effecting insurances with members. By the rules of the institution, members and annual subscribers are prohibited from subscribing policies or effecting insurances with the members, except in the underwriting room of the institution.

4. Partnership firms are not admitted as underwriting members or annual subscribers to Lloyd's.

5. In the year 1858, James Spyer, who is the son of the defendant, applied to the committee for managing the affairs of Lloyd's, to be admitted as an annual subscriber to that institution, in order that he might carry on the business of an insurance-broker.

6. The committee, before admitting James Spyer as an annual subscriber, required him to furnish a guarantee for any debts which he might contract as a broker with the members of Lloyd's, to the committee; and thereupon, at the request of James Spyer, the defendant and one Henry wrote and sent them the following letter:—

"London, 24th March, 1858.

"To the committee for managing the affairs of Lloyd's.

"Gentlemen,—We each of us hereby hold ourselves responsible to the extent of 750*l.* for any debts that James Spyer (who has applied to your committee to be admitted a subscriber of your institution, to enable him to act as an insurance-broker,) may contract in his capacity of such broker, for the term of two years from this date, certain, and for such further period until the respective parties give notice for the discontinuance of such guarantee. (Signed) "Jones Spyer.

"J. Henry."

The statement in the earlier part of this paragraph, as to the requisition of the committee, is inserted in the case subject to the

defendant's objection that it is inadmissible, as the guarantee was subsequently reduced to writing, which writing can be alone looked at to ascertain its purpose or extent.

7. On receipt of the letter, the committee of Lloyd's admitted James Spyer as an annual subscriber to Lloyd's; and James Spyer, from that date until the 14th of December, 1868, continued to be such subscriber, and carried on the business of an insurance-broker, and effected insurances with the underwriting members of the institution.

8. In January, 1860, James Spyer took one Haywood into partnership with him in his business of an insurance-broker, which was thenceforth till the death of Haywood carried on under the firm of Spyer & Haywood. Haywood did not, however, become a member of, or an annual subscriber to, Lloyd's; and the business of the firm of Spyer & Haywood, insurance-brokers, until the 1st of January, 1862, continued to be transacted in Lloyd's room by James Spyer only.

9. In April, 1860, the defendant and Henry, who had known since January, 1860, that James Spyer and Haywood had become partners, wrote to the committee the following letter:—

"London, 11th April, 1860.

"To the committee for managing the affairs of Lloyd's.

"Gentlemen,—Referring to our letter of the 24th of March, 1858, holding ourselves responsible for any debts which James Spyer might contract, to the extent therein named, for two years certain from that date, and for such further period until we should give you notice for the discontinuance of such guarantee, we take leave to give you notice that we put an end to such guarantee from this day. (Signed) "Jones Spyer.

"J. Henry."

10. On receipt and in consequence of this letter, the committee of Lloyd's determined that James Spyer should not be allowed to continue an annual subscriber of Lloyd's, or to continue to effect insurances with the members thereof, without giving security for the debts which might be contracted with such members; and the secretary of Lloyd's, on behalf of the committee, on the 12th of April, 1860, wrote to the defendant requesting him to call at Lloyd's on the following morning to see the member in attendance.

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The statement in the earlier part of this paragraph was inserted subject to the objection that what passed in committee was no evidence against the defendant.

11. The defendant, thereupon, had an interview with the member of the committee of Lloyd's for the time being in attendance at the office, who, acting on behalf and with the authority of the committee, informed the defendant that James Spyer could not be allowed to remain a member [subscriber?] of Lloyd's, without security.

12. The defendant and Henry, in consequence of this statement, wrote to the plaintiffs the following letter:—

"Lloyd's, 17th April, 1860.

"To the committee for managing the affairs of Lloyd's.

"Gentlemen,—The letter we addressed to you under date of the 11th instant, notifying the putting an end to our guarantee dated the 24th of March, 1858, on behalf of James Spyer, we now hereby withdraw, and declare that such guarantee shall continue in force upon the same terms and conditions as are mentioned in such guarantee. (Signed) "Jones Spyer.

"J. Henry."

13. In consideration of this letter, the plaintiffs allowed James Spyer to continue as an annual subscriber of Lloyd's; and James Spyer did in fact from that time, and until the year 1868, continue an annual subscriber of Lloyd's.

14. On the 1st of January, 1862, James Spyer applied to the committee for a ticket for the admission of Mr. Haywood, his partner, agreeably to the 10th and 11th bye-laws. (1)

15. The secretary by order of the committee gave James Spyer a card in the prescribed form of a "Substitute's Ticket," with the name of "Henry Haywood" written therein. On the back of this card was a note as follows:—"N.B. In the event of the parties named on the other side ceasing to act on your behalf, a fresh application will be rendered necessary."

(1) Rule 10. "That each member or subscriber shall be allowed to have one or more substitutes, such substitutes to be either partners or clerks, and to be approved by and subject to the control of the committee."

Rule 11. "That the fees and subscriptions to be paid by members and annual subscribers shall be as follows:—

"Every annual subscriber shall pay for himself 5*l.* 5*s.* per annum, and for each substitute 5*l.* 5*s.* per annum.

15 a. The ordinary course of business of a substitute of an insurance-broker is, that he offers the risks to the various underwriters carrying on their business in Lloyd's room for their acceptance, and procures their acceptance and initials to the slips and signatures to the policies. The substitute also arranges the terms of the policies, and adjusts and arranges for the settlement of claims, and, in short, transacts the ordinary business of an insurance-broker with the underwriting members of Lloyd's. The substitute is sometimes a clerk and sometimes a partner of the member or annual subscriber whose substitute he is.

16. Haywood was never a member or subscriber of Lloyd's. He remained in partnership with James Spyer from the 1st of January, 1862, until his death in November, 1868, and acted as Spyer's substitute under the above ticket.

17. James Spyer stopped payment on the 14th of December, 1868.

18. After Spyer and Haywood became partners, James Spyer up to the 1st of January, 1862, alone, and since that date James Spyer as an annual subscriber, and Henry Haywood as his substitute, transacted business as insurance-brokers in Lloyd's room with various underwriting members thereof.

19. Whether the business was transacted by James Spyer or by Haywood, it was always transacted on account of the partnership, and credit was given in all cases to the firm. The slips on which the particulars of the risk are noted, and which were presented by either James Spyer or by Haywood as his substitute to the underwriting members for their acceptance and initials, were headed, in print, "Spyer & Haywood." The policies, whether prepared by James Spyer or by Haywood, and whether presented to the underwriters for signature by James Spyer or by Haywood, were made out in the names of Spyer & Haywood, as agents, &c. The debts paid to the underwriting members contracted in the course of the transactions, whether effected by James Spyer or by Haywood, were settled by cheques drawn in the partnership style of Spyer & Haywood. The books relating to the insurance transactions, whether effected by James Spyer or by Haywood, were headed "Spyer & Haywood;" and the accounts rendered to and opened with the underwriting members of Lloyd's relating to the transac-

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tions effected by James Spyer or by Haywood were headed "Spyer & Haywood," in account with the underwriters.

20. Many of the transactions above mentioned subsequent to the formation of the partnership resulted in debts contracted with the members of Lloyd's. The debts so contracted were contracted in the capacity of insurance-brokers either by James Spyer acting in the capacity of an insurance-broker, or by Haywood acting as substitute, under the circumstances above stated, in the capacity of an insurance-broker: but credit was in all cases given to the firm of Spyer & Haywood. Many such debts were due at the date of the stoppage, and are still unpaid.

21. When the defendant had the interview mentioned in par. 11, and when he wrote the letter of the 17th of April, 1860, the defendant believed that Lloyd's association was regulated by some rules or bye-laws, although he did not know, nor did he inquire, what the rules and bye-laws were. He did not know of the ticket having been given to Haywood until after the action was brought.

22. The Court was to have power to draw inferences of fact, and if the Court should be of opinion that the defendant was liable in respect of the debts contracted as above mentioned since the 17th of April, 1860, the plaintiffs should be entitled to enter up judgment for the amount thereof.

The question for the opinion of the Court was, whether the defendant was liable for these debts, or any of them.

Sir G. Honyman, Q.C. (*J. C. Mathew* with him), for the plaintiffs. By the new guarantee given on the 17th of April, 1860, the original guarantee of March, 1858, was, notwithstanding the letter of the 11th of April, 1860, restored in its full force; and, in construing both documents, the extrinsic circumstances existing at the time must be looked at. Amongst those circumstances was the fact that the defendant, when he agreed to renew his suretyship for his son, was aware that his son had taken a partner. *Bellairs* v. *Ebsworth* (1), *Montefiore* v. *Lloyd* (2), and *Carr* v. *Montefiore* (3), are distinct authorities in support of the plaintiffs' claim. The

(1) 3 Camp. 53.
(2) 15 C. B. (N. S.) 203; 33 L. J. (C.P.)
(3) 5 B. & S. 408; 33 L. J. (Q.B.) 57, 256.

substantial matter which the defendant and Henry meant to guarantee was, the liability of James Spyer in respect of contracts made by him as a broker at Lloyd's. The circumstance of his having a partner could make no difference, inasmuch as the rules of the association preclude more than one member of a firm acting in the capacity of broker in the house. And the position of the sureties was not affected by the fact that some of the transactions at Lloyd's since the 1st of January, 1862, were conducted by Haywood by virtue of the authority conferred upon him by the substitute's ticket. In that respect the case comes within the principle laid down in *Stewart* v. *M'Kean.* (1)

Mellish, Q.C. (*Murphy* with him), contrà. Two questions arise here, first, what is the true construction of the first guarantee; secondly, whether the second guarantee enlarges the terms of the first. In construing the first guarantee, no doubt regard may be had to the extrinsic circumstances then existing; but it is not competent to the Court to make a new contract for the parties. Now, when the first guarantee was given, James Spyer had no partner; nor did he then contemplate taking one. The debts there referred to and intended to be guaranteed were debts contracted by James Spyer alone in his capacity of broker. The defendant and his co-surety might have had confidence in him, but not in any future partner he might choose to associate himself with. The very case of a change of firm is provided for in the Mercantile Law Amendment Act, 19 & 20 Vict. c. 97, s. 4; though that has been held to be merely declaratory of what the common law was: *Backhouse* v. *Hall.* (2) The decision in *Montefiore* v. *Lloyd* (3) was in favour of the surety. The debts here were all contracted in the name of the firm.

[WILLES, J., referred to *Lord Arlington* v. *Merricke.* (4)]

The second guarantee is made expressly "upon the same terms and conditions" as are mentioned in the first. The parties, therefore, are in precisely the same position as if the first guarantee had never been withdrawn.

Sir G. Honyman, Q.C., in reply.

(1) 10 Ex. 675; 24 L. J. (Ex.) 145.
(2) 6 B. & S. 507; 34 L. J. (Q.B.) 141.
(3) 15 C. B. (N. S.) 203; 33 L. J. (C.P.) 49.
(4) 2 Wms. Saund. 403, 411 *a*.

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WILLES, J. The question raised in this case is one of considerable nicety; but, upon the best consideration I can bring to it, I am of opinion that the plaintiffs are entitled to judgment. Looking at the guarantee without the light of the surrounding circumstances, it would appear to be a guarantee for the acts of James Spyer only, and for debts incurred for himself alone; and *Bellairs* v. *Ebsworth* (1) and *Montefiore* v. *Lloyd* (2) would have been applicable. It would have been as if a simple guarantee of debts due from A. had been sought to be extended and applied to debts incurred by A. jointly with B. whom he had afterwards taken into partnership. The short answer would have been that the defendant agreed to become surety for A., but not for B. The character of the transaction would have been altogether different from that for which the defendant undertook to be liable. But, when the surrounding circumstances are looked at, it would appear that, though the persons liable for the transactions at Lloyd's were a firm, whereas the person originally contemplated by the guarantee was only an individual, yet that the guarantee was given, not with reference to the single individual being the person ultimately liable, but with reference to a course of business in a particular house, viz. Lloyd's, such business being carried on with the individual named; and so the transactions in respect of which the defendant is sought to be made liable are not different in character from those to which the guarantee referred. The guarantee was given in order to induce the committee of Lloyd's to admit James Spyer to the privileges of a member of that body, without which he could not transact business there, and with no specific reference to debts accruing from one person more than from another. When the first guarantee was given James Spyer had no partner; and it might be that considerable difficulty might arise in extending the guarantee by construction so as to make it apply to transactions with a firm of which he might afterwards become a member; though I do not wish to be understood as saying that that might not be, so long as the transactions remain of the same character,—transactions in which he must be the sole responsible person. But, when we come to the renewal, or rather to the giving of the new guarantee on the 17th of April, 1860, I think the circumstances

(1) 3 Camp. 53. (2) 15 C. B. (N. S.) 203; 33 L. J. (C.P.) 49.

are abundantly sufficient to justify us in saying that the original guarantee, if given at that time, would have extended to liabilities arising out of insurances dealt in by James Spyer by reason of his admission as a member of Lloyd's, though in reality the names of Spyer and his partner would appear in the policies. After the sureties had learned in January, 1860, that James Spyer had taken a partner, they took no step in the matter until the 11th of April, when they gave notice to put an end to the original guarantee. In consequence of that letter and a communication from the secretary, the defendant had an interview with a member of Lloyd's committee, and in the result he and his co-surety appear to have been satisfied to incur a new liability, and thereupon they signed the letter of the 17th of April, 1860. That letter refers to and may be construed together with the letter of retractation of the 11th of April, 1860, and with the guarantee of March, 1858. Taking the whole of these transactions together, I think that the most sensible conclusion is, to consider that the guarantee of 1858 was given over again, or one in similar terms having reference to all the surrounding circumstances applicable at that time. Those circumstances were that James Spyer had taken a partner, and carried on the business for the joint benefit of himself and his partner. There was at least a strong probability that the business would for the future be carried on in the name of the firm. The renewal of the guarantee, therefore, would for all practical purposes have been inoperative, unless it were to be construed as applying to the state of things which would arise in similar businesses. No violence is done to the language of the guarantee so construed, by saying that the debts that James Spyer may contract in his capacity of broker at Lloyd's, mean the debts which he may contract by reason of his being admitted to the room, whether on his own behalf or for himself jointly with a partner. Such a mode of construction is not altogether without authority. In *Montefiore* v. *Lloyd* (1), a guarantee was given for the debts of an individual, and it was held not to be applicable to debts incurred by him jointly with a partner, notwithstanding the partnership was contemplated at the time the guarantee was given. But Williams, J., gave very elaborate

(1) 15 C. B. (N. S.) 203; 33 L. J. (C.P.) 49.

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reasons for coming to that conclusion. He refers to the facts and the correspondence to shew that there was nothing in the extrinsic circumstances there to warrant the construction contended for on the part of the plaintiffs. That is a distinct authority, so far as the opinion of that learned judge goes, that it is competent to us to look at all the extrinsic circumstances in order to determine the character of the transactions to which this guarantee applies.

There remains only one other point. Some of the policies were effected by James Spyer himself personally dealing with the underwriters. But at one period he applied for a ticket for a substitute in conformity with the regulations of Lloyd's; and his partner was appointed to act as substitute for him; and sometimes the partner, acting for him as his second self,—the rules of the association only allowing one member of a firm to be a member of Lloyd's,—transacted insurance business in the room on behalf of the firm. It is said that if this be held to be a sufficient guarantee to cover the debts of the firm, it will be because the name of Spyer is used as the person transacting the business in the underwriters' room, and not as the person to be liable; and, as Spyer was not the agent or go-between in the business transacted by Haywood, the debts resulting from these transactions must be excluded. That argument, however, I think, ought not to prevail. The business contemplated was such as Spyer might transact by himself or by delegation; and I cannot bring myself to recognize any difference of liability in respect of transactions brought to maturity by the principal himself, and those perfected by one who acts, in accordance with the usage, in his place. Upon the whole, I am of opinion that it would be much too narrow a construction of this guarantee to hold that it applies only to debts incurred in transactions for which Spyer alone was liable. For these reasons I am of opinion that the plaintiffs are entitled to judgment.

KEATING, J. I am entirely of the same opinion. When the first guarantee was given, no partnership existed; and its words were naturally confined to debts contracted by James Spyer. The object of that guarantee was to enable James Spyer to be admitted a member of Lloyd's, and to secure debts contracted by him in his

capacity of an insurance-broker. Spyer afterwards took a partner named Haywood, and the first guarantee was cancelled by the notice of the 11th of April, 1860, and possibly in consequence of the partnership. Things being so, the defendant was informed of the determination of the committee that Spyer should no longer be a member of Lloyd's, unless he gave security, and thereupon the defendant renewed the guarantee given in 1858. He renewed the guarantee in these terms: "The letter we addressed to you under date of the 11th instant, notifying the putting an end to our guarantee dated the 24th of March, 1858, on behalf of James Spyer, we now hereby withdraw, and declare that such guarantee shall continue in force upon the same terms and conditions as are mentioned in such guarantee." I think that this is equivalent to a new guarantee written in the terms of the former one. But it must be read with the surrounding circumstances, one of which is the defendant's knowledge of the partnership. *Montefiore* v. *Lloyd* (1) is a strong authority in favour of the plaintiffs' view; for, though the guarantee there was held not to apply to the debts of the firm, Williams, J., expressly says, that, though in terms the guarantee was to secure the debts of the defendant's son, it might, if the surrounding circumstances shewed that it was intended to cover debts contracted by the son and his partner, be so construed. All the Court, however, assume that the guarantee there only contemplated that the defendant was to become answerable for the debts of his son. That case is an authority to shew that we are entitled to look at the surrounding circumstances, in order to ascertain what was the intention of the parties at the time of the giving of the guarantee. Here, the guarantee would obviously have been wholly inoperative if it had not extended to debts contracted by the firm; and, unless we are restrained by some rule of law, we are bound to construe it as extending to such debts. *Montefiore* v. *Lloyd* (1) is a clear authority to shew that we are at liberty so to do. Upon these grounds, I agree that the plaintiffs are entitled to judgment.

MONTAGUE SMITH, J. I also am of opinion that the plaintiffs

(1) 15 C. B. (N. S.) 203; 33 L. J. (C.P.) 49.

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are entitled to judgment. No doubt, the written guarantee must contain language which is capable of being applied to the liability which is sought to be enforced; but extrinsic circumstances may be given in evidence for the purpose of shewing the meaning of the instrument and to what debts it was intended to apply. When the extrinsic circumstances here are admitted, it seems to me that this guarantee may include the debts in question, notwithstanding that Haywood, as well as James Spyer, is liable for them. The letter withdrawing the original guarantee, and the letter renewing it, must be read together; and the result of so reading them is that in 1860 a new guarantee is given which has at least as large an effect as that given in 1858. That new guarantee was given after James Spyer had entered into partnership with Haywood, and with full knowledge on the part of the defendant of the fact of such partnership having been entered into. The inference I draw from that is, that it was given not only with knowledge of the altered position of things, but with a view to that partnership. That alone would not be enough, if the language of the guarantee did not warrant it. When, however, we look at the particular nature of the transaction, and see that the guarantee was given for the purpose of enabling James Spyer to continue a subscribing member of Lloyd's, and so to contract there as a broker, it seems to me that the language is abundantly sufficient to include debts arising out of contracts made by him in that capacity, though his partner Haywood was jointly interested. The language, I think, warrants us in holding that to be the right construction. The defendant and his co-surety hold themselves responsible for any debts that James Spyer, who has applied to be admitted a subscriber to Lloyd's, to enable him to act as an insurance-broker, might contract in his capacity of such broker. When James Spyer does contract in his capacity of broker, though a partner may share in the profits of the contracts he makes, he contracts in the manner contemplated by the guarantee. The extrinsic circumstances shew distinctly that that is so. And, when we look at the circumstances attending the renewal of the guarantee in April, 1860, the inference is stronger even than if the partnership between James Spyer and Haywood had existed at the time of the original guarantee.

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Upon these grounds, I agree that there must be judgment for the plaintiffs.

Judgment for the plaintiffs.

Attorneys for plaintiffs: *Waltons, Bubb, & Walton.*
Attorneys for defendant: *Spyer & Son.*

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July 11.

Pleading—Confession of Plea under Rules 22 *and* 23 *of Trinity Term*, 1853—*Estoppel—Release subject to condition subsequent—Deed under Bankruptcy Act*, 1861 (24 *&* 25 *Vict. c.* 134) *s.* 192.

To an action on a bill of exchange, the defendant pleaded that the plaintiff sued him in a former action for the same cause, to which the defendant, on the 3rd of November, 1868, pleaded a deed of composition under the Bankruptcy Act, 1861, dated the 8th of October, 1868, which was after action brought, whereby the defendant covenanted to pay his creditors 1*s.* in the pound by two instalments of 6*d.* each on the 6th of April and the 6th of October, 1869, in consideration of which the creditors released the defendant from their several debts, with a proviso that if default should be made by the defendant in payment of the composition the deed should become void and the creditors should not be bound by the covenants therein contained, and that all things were done, &c., to make the deed an answer to the action; that, on the 13th of April, 1869, the plaintiff replied that the defendant failed to pay the instalment due on the 6th of April, 1869, whereby the deed and the release therein contained became void; that the defendant rejoined equitably that the 6th of April, 1869, was subsequent to the date of the plea, and that he had by mere mistake omitted to pay the instalment on the day, but before replication, viz. on the 8th of April, he tendered it to the plaintiff; that, on the 25th of May, the plaintiff confessed the plea, withdrew his replication, entered a nolle prosequi, and taxed and received his costs in respect thereof, and so the first action was finally determined against the plaintiff (except as aforesaid), and that the plaintiff was estopped from bringing a fresh action for the same cause.

Replication, that the plaintiff ought to be admitted to implead the defendant, by reason of the defendant's failure in the due payment of the instalment of the composition on the 6th of April, whereby the release became null and void:—

Held, on demurrer to the replication, that the plea was a good answer to the action, as the effect of the confession of the plea in the former action, under rules 22 and 23 of Trinity Term, 1853, was to put an end to the litigation altogether as it stood at the time of the confession.

Held also, that the release was good, notwithstanding it was made subject to a condition subsequent, but that the plaintiff might have replied in the former action that the release, which was itself after action, though operative when pleaded, had become avoided by non-payment of the composition.

ACTION by indorsee against acceptor of a bill of exchange for 200*l.* The declaration contained a count on the bill and a count

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for interest and for money due on accounts stated. The writ of summons issued on the 2nd of June, 1869.

Plea, that the plaintiff ought not to be admitted to implead the defendant in respect of the causes of action in the declaration mentioned, because the plaintiff theretofore, in the Court of Common Pleas, sued the defendant for the same causes of action as in the declaration alleged,—setting out the declaration, dated the 26th of October, 1868: That afterwards, on the 3rd of November, 1868, the defendant pleaded to the declaration in the first action [setting out the plea in extenso] a deed of composition dated the 8th of October, 1868 (which was after action brought), whereby, after reciting that the defendant was indebted, &c., and had agreed to pay his creditors a composition of 1*s.* in the pound by half-yearly instalments of 6*d.* each, on the 6th of April and 6th of October, 1869, it was witnessed that, in pursuance of the agreement and in consideration of the payment of the composition, the creditors released the defendant from their several debts, and it was further agreed, that, "if default should be made by the said debtor in payment of the said composition of 1*s.* in the pound as aforesaid, then these presents shall become null and void, and the said creditors shall not be bound by any of the covenants hereinbefore contained," and the plea went on to aver that all the requirements of the Bankruptcy Act, 1861, had been complied with so as to make the deed a bar to the action: That the plaintiff replied on the 13th of April, 1869, taking issue on that plea, and also replied "that the defendant did not duly pay or cause to be paid to the plaintiff the said instalment of 6*d.* in the pound upon the amount of the plaintiff's claim, due and payable on the 6th of April, 1869, whereby the said deed and the release therein contained became and were null and void:" That, on the 17th of April, 1869, the defendant rejoined in that action, by way of equitable rejoinder to the plaintiff's second replication, "that the said 6th day of April was subsequent to the day on which the defendant's plea was pleaded, and that the defendant by reason of a mere mistake as to the day on which the said instalment was payable omitted to tender to the plaintiff the said instalment on the said 6th of April, and before the time of the pleading of the said replication, viz. on the 8th of April, 1869, the defendant tendered to the plaintiff the said instal-

ment, and has since always been ready," &c., and craves leave to pay the instalment into Court: That, on the 25th of May, 1869, the plaintiff confessed the defendant's plea in the first action, in these words,—"The plaintiff confesses the said plea of the defendant, and will not further prosecute his suit in respect of the causes of action to which the said plea is pleaded, and prays judgment for his costs of suit in this behalf:" That afterwards the replications in the first action were struck out by the plaintiff, and the plaintiff confessed the plea in the first action, and gave notice of the taxation of his costs in respect of such confession, and such costs were taxed and paid by the defendant to the plaintiff, and such proceedings were thereupon had in the first action that the same was finally determined and decided against the plaintiff (except as aforesaid): And that all conditions were fulfilled to estop the plaintiff from bringing this action: Verification, and prayer of judgment, &c.

Replication, that the plaintiff ought to be admitted to implead the defendant in respect of the several causes of action in the declaration mentioned, because the defendant did not pay to the plaintiff the instalment of 6*d.* in the pound upon the amount of the plaintiff's claim, due and payable on the 6th of April, 1869, in the plea in the first action mentioned; whereby the deed and the release therein contained became and were and are null and void: Verification, and prayer of judgment, &c.

Demurrer and joinder.

June 29. *Arthur Wilson*, in support of the demurrer. The question is whether the plaintiff is not estopped from maintaining the present action. The plea in the first action was clearly a good defence to that action at the time it was pleaded; and it was competent to the plaintiff to reply that the deed thereby set up became void by reason of the breach of a condition subsequent, viz. the non-payment of the composition therein mentioned. A right of action once gone or suspended cannot be revived: *Ford* v. *Beech* (1); *Fessard* v. *Mugnier* (2); *Ray* v. *Jones*. (3) The case

(1) 11 Q. B. 852.
(2) 18 C. B. (N. S.) 286; 34 L. J. (C.P.) 126.
(3) 19 C. B. (N. S.) 416; 34 L. J. (C.P.) 306.

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of a covenant not to sue is not inconsistent with that doctrine, which though somewhat cavilled at has never been overruled: *Gibbons* v. *Vouillon*. (1)

[WILLES, J. The real question is whether the plaintiff can sue in this action after having confessed the plea in the former action and received his costs.]

Having confessed the plea, and admitted that the defendant was entitled to judgment upon it, the plaintiff is estopped from setting up any answer which was open to him upon that occasion: *Staffordshire Banking Co.* v. *Emmott*. (2)

R. V. Williams, contrà. A confession which admits a plea is in effect a mere discontinuance, and does not preclude the plaintiff from beginning de novo: 2 Lush Pr. 3rd ed. 892. The object of rules 22 & 23 Trinity Term, 1853, was to obviate the injustice which existed before, of there being no means by which the plaintiff could get costs where the defendant pleaded puis darrein continuance a plea which was an answer to the action. All that the plaintiff confessed was, that the plea was a good answer to his claim at the time when it was pleaded, viz. on the 3rd of November, 1868. The defendant having subsequently made default in payment of the instalment due on the 6th of April, 1869, the plea was no longer a defence.

[MONTAGUE SMITH, J. The plaintiff had replied that in the former action.]

But it is competent to him now to say that his cause of action is the failure to pay the second instalment, which became due on the 6th of November, 1869. The judgment of Tindal, C.J., in *Stracy* v. *Bank of England* (3), cited in 2 Wms. Saund. 150 *a*, n. (*i*), shews the disinclination of the Courts to extend the doctrine that a right of action once suspended is gone for ever. A confession of the plea may be treated as a pleading over. The extent of the doctrine in *Ford* v. *Beech* (4), as explained by Wilde, C.J., in *Gibbons* v. *Vouillon* (5), is, that a bare covenant not to sue for a limited time cannot be pleaded in bar. Assuming that a covenant not to sue for a limited time cannot be pleaded in

(1) 8 C. B. 483.
(2) Law Rep. 2 Ex. 208; and see *Allen* v. *Carter*, ante, p. 414.
(3) 6 Bing. 754.
(4) 11 Q. B. 852.
(5) 8 C. B. 483, 499.

bar as an absolute release, *Gibbons* v. *Vouillon* (1) shews that it is competent to parties to covenant that the cause of action shall be released upon the happening of a given event. (2) In *Walker* v. *Nevill* (3), it was held that a covenant not to sue for a limited time, and that the deed may be pleaded in bar and discharge of any action brought within that time, may be pleaded in bar of an action.

Wilson in reply.

Cur. adv. vult.

July 11. The judgment of the Court (Willes, Keating, and Montague Smith, JJ.,) was delivered by

WILLES, J. This case was ably argued on the 29th of last month, by Mr. Vaughan Williams for the plaintiff, and Mr. Arthur Wilson for the defendant, when we took time to consider. [His Lordship stated the pleadings.]

It becomes necessary, in the view we take, to pronounce an opinion upon all the very nice points raised in argument. The question principally argued before us was whether the plea was a good answer to the action. That turns upon the 22nd and 23rd of the Pleading Rules of Trinity Term, 1853, which provide that "a plea containing a defence arising after the commencement of the action, may be pleaded together with pleas of defences arising before the commencement of the action; provided that the plaintiff may confess such plea, and thereupon shall be entitled to the costs of the cause up to the time of the pleading of such first-mentioned plea;" and that, "when a plea is pleaded with an allegation that the matter of defence arose after the last pleading, the plaintiff shall be at liberty to confess such plea, and shall be entitled to the costs of the cause up to the time of pleading such plea," &c. The true question is what is the effect of that confession. Is it a final ending of the cause of action at the time of plea pleaded, or has it merely the effect of a nolle prosequi, entitling the plaintiff to proceed again in another action?

We see no difficulty in upholding a release with a condition subsequent, in accordance with the suggestion of Maule, J., in

(1) 8 C. B. 483, 499. (2) 8 C. B. 590, 501.
(3) 3 H. & C. 403; 34 L. J. (Ex.) 73.

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Gibbons v. *Vouillon*. (1) It must have often happened that a voluntary payment good at the time as extinguishing the debt has been rendered void by matter subsequent, as in the event of bankruptcy of the debtor and an election by his assignees to treat the payment as a fraudulent preference; and it has never been successfully contended that the debt did not thereby revive. Indeed, the contrary is involved in the decision of *Pritchard* v. *Hitchcock*. (2) We can see no substantial distinction between the case of a payment avoided by subsequent events and a release so avoided. This is not a case of temporary suspension, like *Ford* v. *Beech* (3); but a case in which the release will be for ever operative, unless itself subsequently avoided. The distinction is fine, but it is supported by analogy, and it gives effect to the clear intention of the parties. We therefore think the plea in the present action was a valid answer thereto at the time when it was pleaded, though the release was subject to be afterwards avoided by non-payment of the composition.

We are also of opinion that the plaintiff might have replied to the plea in the former action that the release, which was itself after action, though operative when pleaded, had become avoided by non-payment of the composition. This would be analogous to the replication to a plea of set-off, that the debt sought to be set off had been paid after plea; which would be good: *Eyton* v. *Littledale*. (4)

And we are further of opinion that the intention of rules 22 and 23 of Trinity Term, 1853, was not merely to allow the plaintiff to enter a nolle prosequi to the particular action, receiving costs instead of paying them, but to put an end to the litigation altogether as it stands at the time of the confession; the plaintiff electing to abandon the claim as it then exists, and to let the defendant go free, in consideration of receiving the costs of the action, which was properly commenced, though met by an answer of matter subsequently arising.

The use of a confession by the defendant is common enough. If he confesses an action, there is final judgment against him; and, though he have ever so good a defence behind, he is precluded from

(1) 8 C. B. at p. 487.
(2) 6 M. & G. 151.
(3) 11 Q. B. 852.
(4) 4 Ex. 159.

bringing it forward at a subsequent stage, unless he obtains leave to withdraw his confession. A confession by a plaintiff making an end of the action was rare in personal actions before the rule: and no precedents were referred to upon the argument of such a course or of its legal consequences. The only instances we have been able to find are those in which the Attorney-General, on the part of the Crown, has confessed franchises pleaded by defendants in answer to quo warranto proceedings. Such confessions, as to private rights, are conclusive as to fact, though not as to law; and the defendant has judgment for an allowance of the franchise, and that he go without day: Com. Dig. Quo Warranto (C. 5); Co. Ent. 537. a. And the judgment cannot be re-opened by the Crown in a subsequent proceeding: Com. Dig. Quo Warranto (C. 6).

We are satisfied that the intention of the rules of Court, which it is observable have the force of a statute, was to place the plaintiff making a confession of the plea for the purpose of obtaining costs, in substantially the same position as a defendant confessing the action; that the defendant is entitled upon such confession to a final judgment that he go without day; that the effect is not that of a mere nolle prosequi, upon which the plaintiff would have to pay not receive costs; and that the plaintiff cannot afterwards assert in a fresh action any claim which he might have set up in the action which he has so bartered away.

The plea is somewhat ambiguous as to whether judgment was actually entered for the defendant upon the confession; but there is no issue taken upon this; and we incline to think the averments sufficient. Also, some question was raised as to whether it sufficiently appears that the matter of this replication could have been set up in the prior action. We think it follows from what has been already said, that it rests upon the plaintiff to shew that the matter of the replication could not have been set up in the first action, and that upon these pleadings it sufficiently appears, as the fact is admitted to have been, that it could have been so set up. The judgment is therefore for the defendant.

Judgment for the defendant.

Attorney for plaintiff: *J. C. Hall.*

Attorneys for defendant: *Foster & Payne.*

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July 11.

MELSOM *v.* GILES AND WIFE.

Will—Construction—Accruing Share—Specific Devise.

A Testator devised a freehold estate to his son John, for life, and after his death to his child or children, if any, in fee; "but, in case my said son John should die without lawful issue, then unto and equally between my sons George and Robert, in the same manner as the estates herein devised are limited to them respectively; subject, nevertheless, to the proviso hereinafter mentioned, in case my said son John should leave a widow."

He then devised separate freehold estates to his sons George and Robert in precisely similar terms, mutatis mutandis. Then followed the proviso referred to in each of the above devises,—"Provided that, in case any or either of my said sons should depart this life leaving a widow, then I give the hereditaments and premises so specifically devised to such one or more of them so dying, unto his widow and her assigns for life."

The testator died in 1843. Robert died a bachelor in 1848. John died in 1861, and George in 1867, each leaving a widow, but no children:—

Held, by Bovill, C.J., and Brett, J., that the limitation to the widows included the shares accruing to John and George on the death of Robert, as well as the shares originally and directly devised to John and George.

Held, by Byles, J., that the limitation to the widows included only the shares originally and directly devised to John and George.

Revd in Ex Ch 6 CP. 532 but affd by H of L 16th 24

THE following special case was stated pursuant to a judge's order to decide whether the plaintiff was entitled to a legal or equitable interest in more than a moiety of a freehold farm situate in the parish of St. Catherine, in the county of Somerset:—

1. The plaintiff is the widow of John Melsom, the eldest son of the late George Melsom the elder, of Batheaston, in the county of Somerset; and the defendant Anna Maria Giles is the widow of George Melsom, the second son of George Melsom the elder, and is now the wife of the co-defendant.

2. George Melsom the elder died in June, 1843, leaving three sons, John, his eldest son, George, the second son, and Robert, the youngest son, and being the owner in fee of considerable freehold property, including the farm above mentioned.

3. By his will, dated the 28th of June, 1842, after giving small legacies to his nephews and nieces, and an annuity of 15*l.* for life to his servant Ann Downes, charging the same on the hereditaments and premises thereinafter devised to his sons John and George, in the proportions following, viz., 10*l.*, on the hereditaments

and premises devised to John, and 5*l.* on the hereditaments and premises devised to Robert (excepting certain premises), he devised as follows:—

"I give and devise my farm-house, . . . lands, tenements, and hereditaments situate at Batheaston, and also one moiety of my farm, messuages, &c., called Haugh Farm, . . . unto my son John Melsom and his assigns for his life, and, from and after his decease, unto and equally between all and every the child and children of my said son John Melsom, if more than one, their several and respective heirs and assigns, as tenants in common, and, if but one, then to such one child, his or her heirs and assigns for ever; and, in case my said son John Melsom shall depart this life without leaving any lawful issue, then I give and devise the same hereditaments and premises unto and equally between my sons George Melsom and Robert Melsom in the same manner as the estates hereinafter devised are limited to them respectively, subject, nevertheless, to the proviso hereinafter mentioned, in case my said son John Melsom should leave a widow." The testator then devised Bushes Orchard, and three cottages and gardens, &c., situate in Batheaston, and land on Banner Down, &c., and also the other moiety of Haugh Farm, to his son George Melsom; and he devised his farm in the parish of St. Catharine, to his son Robert Melsom. These devises to George Melsom and to Robert Melsom were in terms precisely similar, mutatis mutandis, to the devise to John Melsom, and were subject to the same proviso. The will then continued: "Provided that, in case any or either of my said sons shall depart this life leaving a widow, then I give the hereditaments and premises so specifically devised to such one or more of them so dying unto his widow and her assigns, for and during the term of her natural life: I give, devise, and bequeath my leasehold messuages and premises situate . . . in Bath, and . . . the Lamb Inn, and the messuage, &c., adjoining the inn, situate in Batheaston, unto and equally between my said sons John Melsom, George Melsom, and Robert Melsom, as tenants in common, their several and respective heirs, &c.: All the rest, residue, and remainder of my moneys and securities for money, farming-stock, &c., subject to the payment of my just debts (particularly a debt of 900*l.* due from me to my son George Melsom)

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funeral and testamentary expenses, &c., I give and bequeath the same unto my said sons John Melsom, George Melsom, and Robert Melsom, in equal shares and proportions, their several and respective executors, &c., for his and their own use and benefit."

4. The land so devised to the testator's son Robert was the freehold farm in the parish of St. Catherine above mentioned, the right to a moiety of which is the question in this action.

5. The testator's son Robert died on the 4th of September, 1848, a bachelor. John died on the 19th of July, 1861, leaving a widow, but no children. George died on the 31st of August, 1867, leaving a widow, but no children.

6. Robert Melsom died intestate. John Melsom left a will, by which he devised all his freehold lands, &c., whether in possession, reversion, remainder, or expectancy, to trustees, in trust for his widow for her life, and after her death to sell the same and divide the proceeds amongst certain persons named. George Melsom left a will, whereby he devised to his widow Anna Maria Melsom all his real and personal estate whatsoever and wheresoever situate, in possession, reversion, or expectancy, to hold unto her, her heirs, executors, and administrators, according to the respective natures and qualities of the said premises, absolutely and for ever.

7. It was agreed that no objection should be made by either the plaintiff or the defendants on the ground of want of parties.

The question for the Court was, whether the plaintiff, the widow of John Melsom, was entitled, under the circumstances hereinbefore stated, to a legal or equitable life-interest in more than a moiety of the farm so left to Robert Melsom.

April 28. *Garth, Q.C.* (*J. C. Mathew* with him), for the plaintiff. The intention of the testator was, to give to the widow of each of his sons an interest for life in the estate directly devised to her husband, and not in the estate the husband might succeed to upon the death of a brother. The wording of the proviso shews this, as it in terms only applies to the shares specifically devised. The accruing share of a surviving son, therefore, does not pass to his widow in the same way as the estate particularly devised to each son. Consequently the plaintiff is entitled, as devisee of the testator's heir-at-law, to the whole of the farm in question.

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May 2. *Manisty, Q.C.* (*Murch* with him), for the defendants. The devise of the farm in question is to Robert for life, remainder to his children; and, in the event of his dying without issue, to John and George in the same manner as the estates specifically devised were limited to them, subject to the proviso thereinafter mentioned, in case Robert should leave a widow. The proviso is, that, in case any of my said sons should die leaving a widow, then I give the hereditaments and premises so specifically devised to such one or more of them so dying, unto his widow, for life. Upon Robert's death, therefore, without issue and unmarried, John and George took each a moiety of the farm which had been devised to Robert, "in the same manner as the estates therein devised were limited to them respectively," that is, for life. The word "specifically" in the proviso means, a specific portion devised by the will, as distinguished from a share of the residue. The devise of the moiety of Robert's farm to George is subject to all the incidents of a specific devise in that sense, and, therefore, on the death of George, his widow became entitled to that moiety.

[BYLES, J. According to that construction, the word "specifically" has no meaning. He referred to 2 Jarman on Wills, 3rd ed. 661.

BOVILL, C.J., referred to *Milsom* v. *Awdry*. (1)]

The language used pointedly shews the intention of the testator: and *Ross* v. *Ross* (2) is a distinct authority in support of the construction now contended for. And see *Re Palmer*. (3)

Garth, Q.C., in reply.

Cur. adv. vult.

July 11. There being a difference of opinion, the judgment of the majority of the Court (Bovill, C.J., and Brett, J.) was delivered by

BOVILL, C.J. In this special case, the plaintiff in an action of ejectment claimed, as the widow of one John Melsom, by virtue of his will, the second half of a freehold farm in the parish of St. Catherine, in the county of Somerset, as having devolved to the said John, as eldest son and heir-at-law of his father, George Melsom, senior, the testator.

The defendant, the widow of George Melsom, junior, the second son of the said George Melsom, senior, claimed the half farm in

(1) 5 Ves. 465. (2) 2 Coll. C. C. 269. (3) 3 H. & N. 26.

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question under the will of George Melsom, senior. George Melsom, senior, having made his will, dated the 28th of June, 1842, died in 1843, leaving three sons,—John, the eldest; George, the second; and Robert, the youngest. Robert died a bachelor in September, 1848. John died in 1861, leaving no children, but leaving the plaintiff, his widow. George the younger died in 1867, leaving no children, but leaving the defendant, his widow.

The farm in question in the parish of St. Catherine was devised by the testator to his son Robert for life, &c., and, upon his death without issue, to be divided between John and George, junior. The defendant claims, upon the death of her husband, George Melsom, junior, the half of the farm which was possessed by her husband. The plaintiff contends, that, upon the death of the defendant's husband, George Melsom, the younger, the said half farm passed to her husband John, as heir-at-law of the testator, and, on her husband's death, by his will to her.

The will first devised certain property to John, for life, and, after his death, to his child or children, if any, in fee; "but, in case the said John should die without lawful issue, then unto and equally between the testator's sons George and Robert, *in the same manner as the estates herein devised are limited to them respectively; subject, nevertheless, to the proviso hereinafter mentioned, in case my said son John should leave a widow.*" The will then contained a devise of other property to his son George, in precisely the same terms; and then a devise of other property in the same terms to Robert. Then followed the proviso alluded to in each preceding devise, in these terms:—"Provided that, in case any or either of my said sons should depart this life leaving a widow, then I give the hereditaments and premises *so specifically devised to such one or more of them so dying*, unto his widow and her assigns for and during the term of her natural life." The will then contained a devise of leasehold property in Bath to the three sons, in fee, as tenants in common.

It was contended, on behalf of the plaintiff, that there was by the express words of the proviso a specific and distinct devise to each widow of a life-interest in the property first devised to her husband; and that such specific devise excluded any further devise which might otherwise have been inferred from the general words,

"in the same manner as," &c., used in the preceding devises of the will; and that the proviso prevented those general words from being construed in this will to be words of reference, introducing into the estates accruing on survivorship the incidents of the estates first left to each son.

On behalf of the defendant it was contended that the general words referred to gave an estate for life to the widow of each son in the estate which should accrue to him on survivorship, just as she had an estate for life in the estate first left to him; and, if that were not so, yet an estate for life passed to the widows in the accruing estates, equally as in the estates first left, by the proviso itself; for that the estates on survivorship were no less "specifically devised," that is, it was said, "particularly mentioned as devised," than the estates first left to each son.

Upon reading the will, it appears clearly to us that the testator had a general intention to provide for each son and the family of each son as nearly as possible equally. The will is so drawn as that there is a reference in the devise in favour of each son to a proviso which is to follow them all, for the purpose of containing a provision for the widow of each,—"subject," it is said in each devise, "nevertheless, to the proviso hereinafter mentioned, in case my son shall leave a widow." This is a mere mode of drafting in order to avoid repetition, and obliges us to read the will as if the substance of the proviso were repeated in each preceding devise, and as if the limitations were in each case to the son for life, with remainder to his widow for life, and remainder to his children in fee. Thus reading the will, and considering the place in which the proviso appears, and the reference in it to prior matter contained in the words "so specifically devised," &c., it seems to us that the word "specifically" is satisfied by its being held to refer to each separate devise of separate property to each son; and that it, as it were, so separates the proviso as to make it applicable to the widow of each son, and to her right to an estate for life in the estate first left to her husband. This meaning attributed to the word "specifically" in this will seems to us to be strengthened by observing that it thus also distinguishes the prior devises of estates left separately to each son from the subsequent estate in common left jointly to all the sons. If this view of the proviso be correct, there is further to

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be considered the true interpretation of the devises over to surviving brothers, in case of the death of any one without issue.

The comparison or reference contained in the word "respectively" in the devises over is, we think, clearly with or to the estates left in the first instance to each son. What, then, in the event which happened, of Robert dying without issue, is the proper construction to be put on the devise to the testator's sons John and George, "in the same manner as the estates herein devised are limited to them respectively?" The words relied on by the plaintiff in the proviso to restrict the interpretation of these words being otherwise applicable, and there being no other part of the will to control or limit the meaning usually given to such general words, we are of opinion that, according to the authorities quoted, they must be treated in this will, as in others, as words of reference; and that they therefore entitle the widows to a life-interest in the estates accruing to their husbands on survivorship, just as the widows take a life-interest in the estates first left to their respective husbands. Such a construction of the will seems to us to be more consistent with the general apparent desire of the testator to deal equally with the family of each son. If the words are not treated as words of reference with regard to the widows, it seems difficult to treat them as such with regard to children, if any. It could hardly be a proper construction to say that the same words in the same place are to be treated as words of reference with regard to the children, but not so with regard to the widows, whose life-interests are to precede the estates devised to the children. And yet there is nothing in the proviso which can be said to interfere with the ordinary interpretation of these words in the devises with regard to the children, and any other interpretation with regard to them would seem to be directly contrary to the authorities, and to the equality of provision among the families of the testator's sons.

We think the testator has sufficiently manifested his intention that the accruing shares were to pass both to widows and children in the same manner as the estate originally devised to each son, and in our opinion judgment should be entered for the defendants.

BYLES, J. The female defendant, being the widow of the last surviving son of the testator, claims under his will, not only a life-

estate in the lands directly devised to her former husband, but also in the share which accrued to that husband under the will after his brother's death.

I am of opinion that the provisions of the will in favour of the defendant are satisfied by the life-estate which she takes in the share originally and directly devised to her husband, and that she is not entitled to a life-interest in an accruing share.

The general rule of law seems to be clear, that clauses disposing of the shares of devisees and legatees dying before a given period or event, do not without a positive and distinct indication of intention extend to shares accruing under those clauses: *Pain* v. *Benson* (1): see other authorities collected in 2 Jarman on Wills, 3rd ed. p. 661. It seems to me that no such intention here appears, so far as the widow's interest is concerned, but that the contrary appears.

To make out such an intention, the defendant must rely on the words, "*in the same manner.*" But those words must be read with the context; and, so read, they have a natural and important meaning, and are fully satisfied; for, they give to the younger grandchildren of the testator what otherwise they would not have had, an estate in common in fee in the accruing shares.

A provision for the widow of a deceased son is mentioned in the devise over; but that refers to the life-interest of the wife of the original taker in the lands directly devised to him. The expression "*specifically devised*" appears to me to import very strongly that the life-interest of the wife is to come out of land *directly* devised by name to her husband. And, unless it is so read, it has, I think, in this will, no meaning or operation.

The word "specifically" is, indeed, an inartificial and inappropriate word as applied to realty, because it is said that all devises of land are specific: 2 Wms. on Exors. 932. But its meaning in this context is, I conceive, the same as that in which it is often used, and, for example, in a passage cited in Richardson's Dictionary, from Warburton, "specifically," that is, "with its circumstances." It is, I think, as here used, synonymous with *specially*, or *particularly*, or *directly*. The original share of the defendant's husband is particularized or specified both as to the land and as to the person, and it is directly devised. Or, the word "specifically"

(1) 3 Atk. 80.

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may here mean *certainly*, or *absolutely*, in contradistinction to contingently; for, the testator very well knew to what extent he was benefiting the widow of each son, if her life-interest were confined to her husband's original share directly and certainly devised to him, but could not foresee the future, and therefore was less likely to make additional provision for her under other circumstances unknown to him.

For these reasons, I think our judgment should be for the plaintiff. But, as the majority of the Court are of a different opinion, there will be judgment for the defendants.

Judgment for the defendants.

Attorneys for plaintiff: *Young, Jones, Roberts, & Hall.*
Attorneys for defendants: *Routh & Stacey.*

July 11.

WEST AND OTHERS *v.* THE LONDON AND NORTH WESTERN RAILWAY COMPANY.

Railway and Canal Traffic Act, 1854 (17 & 18 *Vict. c.* 31), *s.* 3—*Land let by Railway Company for storing Coal—Facilities for receiving, forwarding, and delivering Traffic.*

A railway company, having land adjoining one of their stations, let the whole of it to P., a coal merchant, for the purpose of storing coal brought by their line. P. did not require or actually use the whole of the land for this purpose. W., another coal merchant, applied to the company to provide him on similar terms with land for storing coal, or to let to him the part of the land not actually used by P. The company refused to do so. W. then applied to the Court under the Railway and Canal Traffic Act, 1854, s. 3, for an order compelling the company to desist from allowing P. to store coals on the land, or to give similar facilities to him:—

Held,—by Bovill, C.J., and Keating, J.,—that a means of storing coal at the station to which it is sent being a necessary facility for the proper carrying on of the coal trade, the company had no right to grant greater facilities to P. than to W., and that they ought to be restrained from doing so:

Held,—by Montague Smith and Brett, JJ.,—that the Railway and Canal Traffic Act only relates to facilities in the receiving, forwarding, and delivering traffic, and that the Court has no jurisdiction to interfere with matters not relating to these, and that facilities for storing coal after it has been delivered to the consignee do not relate to the receiving, forwarding, or delivering of traffic, and are not therefore under the control of the Court.

RULE calling on the defendants to shew cause why an injunction should not issue under the Railway and Canal Traffic

Act, 1854 (17 & 18 Vict. c. 31), requiring them to carry coals for the plaintiffs to Lubenham Station on the same terms and at the same rates they had previously carried for them, or as they carried for one Perkins, and to permit the plaintiffs to deposit coals carried by the defendants upon an adequate part of the coal wharf at the Lubenham Station on their paying for the accommodation at the same rate that they and others paid at other stations, or as one Perkins paid at the said station, or why the defendants should not be restrained from giving undue and unreasonable preference and advantage to Perkins in respect of carrying coals to that station, and permitting him to deposit them on the coal wharf.

June 16. *Davison, Q.C.*, and *Littler*, shewed cause.
Cave supported the rule.

The facts and arguments sufficiently appear from the judgments of the Court.

Cur. adv. vult.

July 11. The Court being equally divided, the judgment of Bovill, C.J., and Keating, J., was delivered by

BOVILL, C.J. In this case, which was an application for an injunction under the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), I regret to say that the Court is equally divided in opinion. I have now to deliver the judgment of my Brother Keating and myself.

The complainants in this case, Messrs. West, Biddles, & Co., who are coal-merchants in Leicestershire and Northamptonshire, have for some years been accustomed to send coal to various stations of the defendants' railways, and, amongst others, to the stations upon the Rugby and Stamford Railway. The complainants, as well as other coal-merchants, were allowed the use of certain wharves or depôts at these stations for the reception and deposit of the coals consigned to them respectively, for which accommodation each coal-merchant paid a remuneration to the company. The practice of the company seems to have been to apportion the accommodation at the different stations amongst the coal-merchants who required it; and each coal-merchant used his wharf as a kind of store for

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his coals until they were sold and were required to be removed. From the nature of the inland coal trade, the wharf or depôt accommodation is almost essential to its being carried on profitably to the merchant. It also promotes the traffic of carrying coals upon the railways; and the practice of the companies providing such accommodation is very general upon most of the railways.

In the course of the year 1869 an additional station was opened upon the Rugby and Stamford line at Lubenham. There was a space of ground attached to and forming part of the station there which was suitable for and might have been appropriated to coal-wharves in the usual way, and it was sufficient in extent to afford the usual accommodation for more than one coal-merchant. The complainants thereupon commenced sending coals by the defendants' railway to Lubenham station for sale, and such coals were unloaded and deposited and stored in the usual way upon parts of the station marked out by the company's officers for that purpose.

A Mr. Joshua Perkins, of Lubenham, also then commenced sending coals by the defendants' railway to Lubenham station for sale, and these were deposited and stored in like manner, in the usual way, upon another part of the wharf at that station.

On the 13th of November, the complainants received a letter from the defendants' engineer's office, as follows:—

"Sir,—I shall be at Lubenham station on Tuesday next at 11.37, to stake out the coal-wharves, if you will be good enough to come and point out what ground you require. Could you get to know for me what ground Mr. Tibbett requires? "S. G. Byrd.

"Messrs. West & Co., Market Harborough."

The complainants continued to send their coal as before, and to deposit it at Lubenham station until about the 20th of December, when the following letter was sent to them by the company:—

"General Goods Manager's Office,

"Euston Station, London, 20 Dec. 1869.

"Gentlemen,—The whole of the wharfage accommodation at Lubenham being let to Mr. Perkins, I beg to give you notice that, from and after this date, the London and North Western Railway cannot convey any more coal for you to that station.

"G. Findlay.

"Messrs. West & Co., Coal-Merchants, Market Harborough."

The complainants answered as follows:—

"Market Harborough, Dec. 22, 1869.

"Dear Sir,—Your letter of the 20th is to hand. If your instructions with regard to this (Lubenham) station can be carried out, we can scarcely exaggerate the injustice it is to a firm like ourselves who, for twenty years, have been establishing a trade which your company, by giving monopoly to an individual at our expense, and to the great injury of the public, at once cause us to sacrifice. May we ask that you will grant the writer an interview upon the subject upon any day after Wednesday next, and in the meantime allow the usual traffic to continue. "West, Biddles, & Co.

"G. Findlay, Esq., Euston Station."

The company sent the following reply:—

"District Goods Superintendent's Office,

"Northampton, Dec. 23, 1869.

"Gentlemen,—I beg to inform you that on and after the 1st of January next, we shall cease forwarding any of your waggons laden with coal to our Lubenham station. "Edward King."

It now appears from an agreement signed by Mr. Perkins, which was handed to the Court after the conclusion of the argument, that the company had, on the 22nd of October previously, agreed with Mr. Perkins to let him the whole of the wharf accommodation at Lubenham station at a monthly rent, and subject to a month's notice to give up possession.

After the receipt of the letter of the 23rd of December, the complainants sent some coals to be forwarded by the company from Market Harborough to Lubenham station, but the company refused to forward them. This, however, for the purposes of the present rule, is not to be treated as an absolute refusal to carry the coals, if the complainants could have received them at Lubenham without a wharf, and is only to be considered as a refusal to allow the complainants any wharf accommodation at Lubenham; which, however, is for all commercial purposes (as it appears to have been considered by both parties) virtually preventing the coals being sent by the complainants to that station.

It must be taken, upon the affidavits and letters, and in the absence of any denial by the company, that the whole of the available wharf ground has been allotted to Mr. Perkins; that the

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space so let to Mr. Perkins is larger than he uses or requires for his trade, and that he does not use more than half of such space, the rest being left unoccupied; and it must be taken that this space so unoccupied by him is suitable for the usual accommodation for the complainants and other coal-merchants,—the complainants having in fact been allowed the use of it until December, as before mentioned.

The company have a further space of ninety-four square yards which is not at present used, though the company's goods manager states in his affidavit that he believes the same will be utilized by the company for their traffic.

The ground upon which the company contend that they can refuse the complainants any wharf accommodation for their coal is, that they have let the whole of the available space to Mr. Perkins; and, having thus practically excluded all other coal-merchants except Mr. Perkins, the engineer's affidavit concludes by stating that Mr. Perkins *is* (viz., when the affidavit was sworn) the only trader in coal at this place.

The complainants having sustained much injury and loss in their trade by being unable to compete with Mr. Perkins in supplying Lubenham and the neighbourhood with coals, this matter was then placed in the hands of their solicitors. The latter complained by letter to the company of the monopoly thus given to Mr. Perkins of the coal-trade at Lubenham and the surrounding villages, by the company giving him the exclusive privilege of stacking his coal at the station; but no redress was obtained from the company; and the complainants then obtained the present rule. The object of the rule is, to compel the company to abstain from giving Mr. Perkins the exclusive advantage of depositing his coal at the station, or to give similar accommodation to the complainants. They complain that, by the arrangements in question, an undue preference and advantage is given by the company to Mr. Perkins, and that they are subjected to undue prejudice and disadvantage: and there can be no doubt that the effect of what has been done by the company is to exclude the complainants from any share of the facilities for the coal-traffic which exist at the station, and that it does practically exclude them from sending coal to Lubenham station for the purposes of their trade, and thus

creates a monopoly of the trade in favour of Mr. Perkins, and to the prejudice not only of the complainants but of the public.

It was contended, however, that the case did not come within the provisions of the Railway Traffic Act, 1854. That Act, by s. 2, enacts that every railway company shall afford all reasonable facilities for receiving, forwarding, and delivering traffic upon and from the railway, and that no such company shall make or give any undue or unreasonable preference or advantage to or in favour of any particular person or any particular description of traffic in any respect whatsoever, nor shall any such company subject any particular person or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. And by the interpretation clause, s. 1, it is enacted that the word "railway" shall include every station of or belonging to such railway used for the purposes of public traffic. By the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 16, the company were authorized, for the purpose of constructing the railway or the accommodation works connected therewith, to erect and construct, amongst other things, such yards, stations, wharves, and other works and conveniences as they might think proper, and to do all other acts necessary for making and using the railway.

It seems to us that the space of ground used for the deposit of coals at Lubenham station must be considered a part of the railway, within the meaning of the Railway Traffic Act, and that the wharf accommodation to coal-dealers is not only an usual and ordinary and reasonable accommodation for the coal-traffic coming to the railway, but that it is in fact so necessary that without it the trade in coal and the traffic of coal on the railway cannot practically and commercially be carried on.

The railway companies have secured a monopoly of the carrying trade; but this was granted to them and is to be used for the benefit of the public; and one great object of the Act of 1854 was, to compel the companies to act with impartiality to all persons desirous of using the railway, and to secure that all should be placed upon equal terms. The legislature has placed a restriction upon the companies from using their powers and their railways for the benefit of one person to the exclusion of others, and has

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required that all persons should be treated alike. At the same time, it has been considered that due regard may be had to any peculiar circumstances, as well as to the safety and convenience of the public and the fair interests of the companies themselves.

In most of the decided cases, the question has arisen upon a difference in the amounts charged for carriage to particular persons: but the Court has always considered that the Act of 1854 prohibited any difference being made in the *accommodation* also that was afforded to different persons; and the Court will always look at the true character and effect of the arrangements which are complained of. I cannot bring my mind to doubt that what has been done in this case was distinctly what the legislature intended to prevent. It gives a direct advantage to Mr. Perkins at the expense of the complainants, and is a direct prejudice to the complainants, to the benefit of Mr. Perkins. There is no sufficient reason shewn for giving this preference to Perkins; and there are no circumstances, not even the benefit of the public, to excuse or justify it. Indeed, the public, if such monopolies could be created by the railway companies at this and other stations, would suffer most materially; and it seems to me that there is nothing to make the arrangement in question otherwise than undue and unreasonable within the meaning of the statute.

It was contended that the arrangement was not within the Act, inasmuch as it was only for the purpose of enabling Mr. Perkins more profitably to carry on his trade. But this, as it seems to us, will not justify the company in using their station in connexion with the traffic brought by their railway for such a purpose. It is still using their railway (of which the station is a part), and their powers, for the purpose of the coal-traffic, and for the purpose of giving an advantage to one person over another, which the statute intended to prohibit. It is clear also that they can and do give the advantage to Mr. Perkins only as proprietors of the railway and station, and as carriers of coal upon their railway.

In *Baxendale* v. *Great Western Ry. Co.* (*Reading Case*) (1), it was considered that a railway company *who were also carriers to and from the railway*, could not, *in such separate trade of carriers*, give an undue preference to themselves, or impose an undue pre-

(1) 5 C. B. (N. S.) 336; 28 L. J. (C.P.) 81.

judice upon others: and a similar rule was acted upon in *Garton* v. *Bristol and Exeter Ry. Co.* (1) We think the case also falls within the principle upon which the Court acted in *Marriott's Case* (2), where it was held that the omnibus of the complainant could not be excluded from the Kingston station, whilst that of another proprietor was admitted, there being no circumstances to justify the difference in the two cases.

In our judgment, the rule in the present case should be made absolute to restrain the company from giving any undue preference and advantage to Mr. Perkins in respect of carrying coals for him to Lubenham station, and permitting him to deposit the coals so carried on the coal-wharf at the said station, whilst they exclude the complainants from carrying and depositing his coal in like manner, and injoining them to treat the complainants and Mr. Perkins upon terms of equality, and to give them the same facilities as regards the accommodation for receiving and depositing coals at Lubenham station. But, as the Court is equally divided in opinion, the rule will drop.

The judgment of MONTAGUE SMITH and BRETT, JJ., was delivered by

MONTAGUE SMITH, J. We regret that a difference of opinion exists in this case, in which Messrs. West, Biddles, & Co., who are coal, stone, and lime merchants, applied to the Court, under the Railway and Canal Traffic Act, for an injunction to the London and North Western Railway Company.

The substance of the application was to compel the company, not only to carry the coals of the applicants to the Lubenham station on their Rugby and Stamford line of railway, and to give them facilities for unloading there, but also to allot to them a part of a wharf of the company adjoining the station, for the purpose of stacking their coal for sale, and until it suited them to deliver it to customers. They also prayed, in the alternative, that the company should be restrained from allowing Mr. Perkins to deposit and stack his coal for the purpose of sale on such wharf. The Lubenham station was opened last year; and the company turned a

(1) 6 C. B. (N. S.) 639; 28 L. J. (C.P.) 158.
(2) 1 C. B. (N. S.) 499; 26 L. J. (C.P.) 154.

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piece of ground adjoining it into a wharf. Messrs. West, Biddles, & Co. were for some time allowed to stack their coals on the wharf, on ground set out for the purpose, upon payment of a rent proportioned to the ground set out for them. It appears that, in October, 1869, the company let the wharf to Mr. Perkins at a monthly rent, and thereupon gave notice to Messrs. West, Biddles, & Co., that they could no longer stack their coal upon it. It is stated in the affidavits that the wharf is larger than Mr. Perkins requires for his present trade, and that in fact he does not use more than one half of it, leaving therefore sufficient for the trade of Messrs. West, Biddles, & Co., if it were set out for them. It appears also that there is some other land of the company adjoining the station, at present unoccupied; but the company say they may require that land for general purposes; and the application is directed mainly to the object of having a part of the coal-wharf now let to Mr. Perkins allotted to Messrs. West, Biddles, & Co.

The substance of the application was, as stated on the argument, to compel the company to allot a part of the wharf to the applicants, as a depôt where their coals might be stacked and kept for sale, the applicants being ready to pay rent for the use of the part so allotted; and we understood that, unless they succeed in obtaining the injunction to this extent, they do not at present intend or desire to carry coal to Lubenham.

The question then arises, whether the Court has jurisdiction under the Railway and Canal Traffic Act to carry out this object. And it seems to us it has not. It strikes one at the outset that what the applicants want from the company has nothing whatever to do with the conveyance and transport of the coal, or with any facilities or accommodation relating to conveyance and transport. They really want the company to provide them with a wharf or store where they may sell their coal when and as they please.

The preamble of the Act (17 & 18 Vict. c. 31) which gives this Court jurisdiction recites that "it is expedient to make better provision for regulating the traffic on railways." The 2nd section enacts that the company shall afford "all reasonable facilities for the *receiving* and *forwarding* and *delivering* traffic upon and from their railways." These are the governing words. It then enacts that "no company shall make or give any undue or unreasonable preference or

advantage to or in favour of any particular person or company, or any particular description of traffic, in any respect whatsoever, nor subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage, in any respect whatsoever." It seems to us, that, according to ordinary rules of construction, this last part of the enactment must be construed to apply to undue preference or undue prejudice in matters incidental to the conveyance of traffic, and to facilities for receiving, forwarding, and delivering such traffic. In the interpretation clause, s. 1, it is enacted that the word "traffic" shall include goods, animals, and other things *conveyed* by any railway company.

The 3rd clause, which gives the Court jurisdiction, confines its power to "anything done or any omissions made in violation or contravention of the Act."

These being the enactments of the statute, it seems to us that this Court has no jurisdiction under it to deal with the complaint in question. That complaint does not relate to the conveyance of the coal, or to the receiving, forwarding, or delivering of it. The coal is received at the place whence it is consigned, and it is forwarded to Lubenham; and, when it is there handed over to such a consignee as Mr. Perkins is, in order that he may stack it and keep it and sell it at his pleasure to a purchaser, we think it is delivered within the meaning of the statute. We think that the complaint relates to matters wholly distinct from the receiving, forwarding, and delivering of the coal. It relates to a matter foreign to all these things, and arising after all that concerns the conveyance and delivery of the coal is absolutely and entirely at an end.

It is said that the company, by letting their wharf to Mr. Perkins for the above purposes, give him an advantage in the sale of his coal over the applicants. But this is not an advantage in the conveyance or transport of the coal; and if it is not one of the advantages within the Act, the fact that it is an advantage to him and a disadvantage to others becomes immaterial, and cannot give the Court jurisdiction. It seems to us that, if we were to extend our jurisdiction to things beyond those which relate to the conveyance of traffic and the matters incidental to its transport, we should exceed the authority conferred on us by the Act, and might then be asked to extend our interference to various matters not at

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all contemplated by it,—such as, the arrangements respecting refreshment-rooms, book-stalls, and other like matters.

No case can be found where under similar circumstances the Court has interfered. On the contrary, in a case which is nearest in its facts to the present,—*Re Oxlade* (1),—it may be inferred from the report that the Court refused to interfere to the extent required by the present applicants. That case illustrates the difficulties which would be involved in attempting to impose regulations on companies beyond those relating to the conveyance of traffic. It appeared that the North Eastern Railway Company, under an arrangement with colliery owners, appointed an agent of their own to receive the coals at certain depôts, and there sell them, and that the company allowed only the owners of collieries so to deposit coal, and would not allow coal-merchants or dealers to do so. Mr. Oxlade complained, on behalf of himself and other coal-dealers, that the company excluded them from the use of these depôts. The Court, in directing a reference to the master (after time taken to consider), were careful to limit the inquiry to the accommodation and facilities provided for "unloading" of coal, and to the terms on which the company "carried" coals for persons other than Oxlade, and whether there was any difference in the circumstances under which the company had "carried" coals for other persons. The Court seem to have abstained from directing the master to inquire into the accommodation for the stacking and sale of the coal, and limited the inquiry to the accommodation provided for carrying and unloading, which are clearly within the Act. Upon the report of the master, the Court discharged Mr. Oxlade's rule so far as it related to the coal depôts.

The case of *Re Marriott* (2) is clearly distinguishable. There, the London and South Western Railway Company refused to admit the complainant's omnibus, bringing passengers from a particular district, into their yard to set down or take up. The Court held that these passengers were subjected to an undue disadvantage with reference to passengers coming to the station by other carriages. This was obviously a matter incident to the conveyance of the passengers, and related to the facilities for forwarding and

(1) 1 C. B. (N. S.) 454; 26 L. J. (C.P.) 129.
(2) 1 C. B. (N. S.) 499; 26 L. J. (C.P.) 154.

delivering of traffic, and therefore fell within the Act. It may be observed that, in a subsequent case, the Court refused to compel the company to admit the cabs of the applicant to their station, although other cabs had been so admitted: *Re Beadell.* (1) It is not necessary to notice other decisions; for, it will be found that in all the cases where the Court has hitherto exercised jurisdiction under the Act, it has interfered only in matters relating or incidental to the conveyance and transport of traffic.

It was scarcely denied, on the argument, that, if Mr. Perkins occupied all the land allotted to him, it might be an answer to the present application; and so, if the applicants succeeded, and they and Mr. Perkins together occupied the whole land, that it might be an answer to future applicants. If this is so, it really follows that these matters stand on different considerations from those relating to the carriage of passengers or of traffic. The suggested evil of monopoly would in the supposed cases exist as it is said to do now: but it would so exist, not because of any undue preference in the conveyance of the coal, or in anything relating to its conveyance, but because of the collateral circumstance that the company have surplus land more than they at present want for the requirements of their "traffic," properly so called, and which they choose to let for other purposes. Any dealer who can get land near a station may of course obtain the same advantage.

The 16th section of the Railways Clauses Consolidation Act, 1845, which enables the company to construct stations, yards, and wharves, and to do other acts necessary for making and using the railway, does not afford a reason, as it seems to us, for enlarging our jurisdiction under the Railway and Canal Traffic Act to matters unconnected with conveyance and transport. Wharves and yards are necessary and convenient for the temporary deposit of goods in the course of transit; and to regulate their use for such purposes would clearly be within our province under the Act: but, for the reasons before given, the permanent occupation of them for purposes unconnected with carriage and transit, as, for the deposit of goods for sale, appears to us to be a matter beyond the scope of the Act.

Although the company (unless under some provisions of their

(1) 2 C. B. (N. S.) 509; 26 L. J. (C.P.) 250.

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special Acts) may not be common carriers of coal; see *Johnson* v. *Midland Ry. Co.* (1); yet, as they do carry coal for Mr. Perkins to Lubenham, they may be bound under proper conditions to carry coal for other dealers to that station, and to give reasonable facilities for unloading it there. But that was not the substance of the demand made by the present applicants upon the company. The substance of the demand made upon the company, and of the application to this Court, was, that the company should allot a portion of the land let to Mr. Perkins to the applicants, to be used by them as a depôt for the stacking and sale of their coals. We think, for the reasons above stated, that this demand is beyond the scope of the Railway and Canal Traffic Act, and consequently that the rule ought to be discharged.

No rule.

Attorneys for plaintiffs: *I. H. Douglas, for Douglas, Market Harborough.*

Attorney for defendants: *J. Blenkinsopp.*

June 16.

PARK GATE IRON COMPANY, LIMITED, APPELLANTS; COATES, RESPONDENT.

County Court Appeal—Jurisdiction—Notice of Appeal—Security for Costs—Waiver—County Court Act, 1850 (13 & 14 *Vict. c.* 61), *ss.* 14, 15, & 16—*County Court Rules*, 1867, *r.* 188.

The provisions of 13 & 14 Vict. c. 61, s. 14, requiring the party appealing from the decision of a county court judge to give a notice of appeal and security for costs within ten days, are not conditions precedent to the jurisdiction of the court to hear the appeal, and they may therefore be waived by the respondent.

RULE calling on the appellants to shew cause why the case on appeal should not be struck out of the special paper, on the ground that no notice of appeal or security for costs had been given, as required by the County Court Act, 13 & 14 Vict. c. 61, s. 14. (2)

It appeared from the affidavits that the respondent had brought

(1) 4 Ex. 367; 18 L. J. (Ex.) 366.

(2) 13 & 14 Vict. c. 61, s. 14:—enacts "That if either party in any cause, of the amount to which jurisdiction is given to the county courts by this Act, shall be dissatisfied with the determination or direction of the said court in point of law, or upon the admission or rejection of any evidence, such party may appeal from the same to any of the superior courts of common law at Westminster, ... pro-

an action against the appellants for injury sustained through the appellants' negligence. The action was sent down to the county court at Rotherham for trial, and the respondent obtained a verdict. The appellants at the time stated to the respondent their intention to appeal, and the case on appeal was accordingly drawn up and seen by both parties. The respondent was fully aware of the steps the appellants were taking, and that no written notice of appeal had been given (1), and also that no security had been given, but he took no objection to the want of such written notice or security, and waived his right to insist on the performance of these statutable requirements, as far as it was possible for him to do so. Security was ultimately given by the appellants, but not within ten days of the date of the decision.

Quain, Q.C., shewed cause. The only question is whether the provisions of the County Court Act, 1850 (13 & 14 Vict. c. 61, s. 14), respecting the giving of security and notice of appeal can be waived by the respondent. They are entirely for his benefit,

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vided that such party shall, within ten days after such determination or direction, give notice of such appeal to the other party, or his attorney, and also give security, to be approved by the clerk of the court, for the costs of the appeal, whatever be the event of the appeal, and for the amount of the judgment if he be the defendant and the appeal be dismissed; provided, nevertheless, that such security, so far as regards the amount of the judgment, shall not be required in any case where the judge of the county court shall have ordered the party appealing to pay the amount of such judgment into the hands of the clerk of the county court in which such action shall have been tried, and the same shall have been paid accordingly. . . ."

S. 15:—"That such appeal shall be in the form of a case agreed on by both parties, or their attorneys, and if they cannot agree, the judge of the county court, upon being appealed to by them, or their attorneys, shall settle the case and sign it; and such case shall be transmitted by the appellant to the rule department of the master's office of the court in which the appeal is to be brought."

S. 16:—"That no judgment order or determination given or made by any judge of a county court, nor any cause or matter brought before him, or pending in his court, shall be removed by appeal, motion, writ of error, certiorari, or otherwise, into any other court whatever, save and except in the manner and according to the provisions hereinbefore mentioned."

(1) By r. 188 of the County Court Rules, 1867, "the notice of appeal shall be in writing, and shall state the grounds on which the party appeals, and shall be signed by the appellant, his attorney or agent, and such notice shall be sent to the registrar as well as to the successful party by post or otherwise."

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and it is a general rule that where a duty is imposed by statute for the benefit of any particular person, he can waive it. This was held in *Graham* v. *Ingleby* (1), and other cases will be found collected in Broom's Legal Maxims, 4th ed. pp. 670—677. The case of *Morgan* v. *Edwards* (2) will be relied on on the other side, but that is distinguishable because it was a criminal case, and the public were interested. The jurisdiction to hear the appeal is given by the general words of the statute, and these provisions are merely matters rendered obligatory upon the appellants for the benefit of the respondent, and do not affect the jurisdiction of this Court.

Field, *Q.C.*, and *Kemplay*, in support of the rule. The provisions of the Act are imperative, and cannot be waived; any matter depending upon contract or any matter of procedure may be waived, but not a condition upon which the jurisdiction of the Court depends. This case cannot be distinguished from *Morgan* v. *Edwards* (2); which was decided on the words of 20 & 21 Vict. c. 43, s. 2. The case was not strictly a criminal case, and the Court expressly founded their decision upon the fact that the objection went to the jurisdiction, and held that it could not, therefore, be waived by conduct similar to that of the respondent in this case. *Peacock* v. *The Queen* (3) is another case to the same effect, and is cited and followed in *Morgan* v. *Edwards*. (2) The words of s. 16 of 13 & 14 Vict. c. 61, are exceedingly strong, and amount to a prohibition to the Court to hear this case. In *Stone* v. *Dean* (4), which was a case on this very Act, the Court held they had no jurisdiction to hear the appeal because security had not been given within the required time; there was, however, no question of waiver, and the decision would have been the same if the provision with respect to security had been treated as a matter of procedure. *Graham* v. *Ingleby* (1) and *Furnival* v. *Stringer* (5) are distinguishable, for there was no question of jurisdiction in those cases.

BOVILL, C.J. I am clearly of opinion that if the objections taken by the respondent to our hearing the appeal can be waived,

(1) 1 Ex. 651.

(2) 5 H. & N. 415; 29 L. J. (M. C.) 108. 6 Jur. N.S. 374.

(3) 4 C. B. (N. S.) 264; 27 L. J. (C. P.) 224.

(4) E. B. & E. 504; 27 L. J. (Q.B.) 319. 4 Jur. N.S. 534.

(5) 1 Bing. N. C. 68

they have been waived. It must be taken that the respondent was aware that no written notice or security had been given as required by the Act, and that, with that knowledge, he proceeded, in concert with the appellants, in the settlement of the special case. It comes to a question, therefore, on the construction of the Act of Parliament, whether the performance of the matters required by s. 14 can be waived by the respondent. By the 14th section it is enacted :—[His Lordship here read s. 14.] Then the 16th section enacts:—[His Lordship read s. 16.] Section 16 is, no doubt, a prohibitory enactment; but it seems to me that the clause is satisfied by limiting it to the provision of s. 15, that the appeal shall be in the form of a special case.

The provisions of s. 14, that there shall be notice of appeal and security, seem to me more in the nature of procedure and practice, and to have been intended for the benefit of the respondent. It is not a matter with which the public are concerned. If this be so, it falls within the rule that either party may waive provisions which are for his own benefit, and it comes within the case of *Graham* v. *Ingleby*. (1) We have been pressed with the cases which have been decided on 20 & 21 Vict. c. 43, and, no doubt, in them it was held that the provisions of the Act not having been complied with, the Court had no jurisdiction. In *Peacock* v. *The Queen* (2) the procedure was of a criminal nature, where no one for that reason had a right to waive any irregularity, and in *Morgan* v. *Edwards* (3) the parties really interested in the provisions of the Act being complied with were the justices, and the parties, therefore, were not competent to dispense with their fulfilment. Consistently with those cases it seems to me that in this case, where the provisions of the Act are entirely for the benefit of the respondent, we may hold him able to dispense with their fulfilment.

KEATING, J. I entirely agree that if the objections can be waived they have been waived; the doubt I have entertained, and which I still strongly retain, is, how far s. 16 can be read, as suggested

(1) 1 Ex. 651.
(2) 4 C. B. (N.S.) 264; 27 L. J. (C.P.) 224.
(3) 5 H. & N. 415; 29 L. J. (M. C.) 108.

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by my Lord, as confined to s. 15. The words here are very strong; the Court can have no right to hear the appeal except under the Act, and the Act seems to provide that the county court judge shall finally dispose of the case, except in certain cases which are specially provided. No doubt, in one sense the provisions are for the benefit of the respondent, but still the jurisdiction of the Court depends entirely on s. 14, which provides that these conditions shall be fulfilled in the case of all appeals; and then come the prohibitory words of s. 16, which seem to me to be peculiarly strong; no judgment is to be removed by appeal, "except in the manner," and, which is still stronger, "according to the provisions" thereinbefore mentioned. It has been argued, it seems to me with great force, that these provisions must include the giving due notice of appeal and security within the appointed time; however, the rest of the Court hold strongly the contrary opinion, and I am not desirous of dissenting, notwithstanding the strong doubt I entertain on the subject.

MONTAGUE SMITH, J. I think this rule should be discharged. The objection taken is that no proper notice of appeal or security was given within ten days, as required by the Act. Now, if that objection goes to the jurisdiction of the Court, I quite agree that it cannot be waived; but if it be a condition inserted entirely for the respondent's security it may be waived, and, if it can be waived, there is undoubtedly sufficient evidence that the respondent has waived it in this case. I think we give a reasonable construction to the 14th, 15th, and 16th sections by holding that the provisions respecting notice and security are entirely for the respondent's benefit, in which no public interests are involved, and which, according to the ordinary rule, he may therefore waive; the words of s. 16 no doubt are strong, but they may well relate to the mode of stating the case and sending it up, and those are matters in which the Courts are interested, as otherwise much disorder would be introduced; the provisions of s. 14 concern solely the interests of the respondent, and the words of s. 16, though they are negative words, may be read, as far as they affect the jurisdiction of the Court, as confined to matters which relate to jurisdiction. The cases on 20 & 21 Vict. c. 43 at first sight appear inconsistent with

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this view; but they differ from the present case in this respect: that they relate to a procedure which is in the nature of a criminal procedure, and it is a rule in criminal matters that the parties cannot waive what the law directs. I observe, too, that in *Morgan* v. *Edwards* (1), although the Court seem to think that the objection goes to the jurisdiction, they qualify their judgment by throwing out that, in some circumstances, cases stated without notice having been given might be heard. However, it is not necessary to discuss that question now, for that case is distinguishable on the ground I have mentioned; and we do no violence to it in holding that the requirements of the present Act respecting notice and security may be waived by the respondent.

BRETT, J. It is clear that the respondent waived, if he could do so, and intended to waive a want of notice in writing and security. If they are conditions precedent to the jurisdiction of the Court to hear the appeal, it is clear that they cannot be waived; but if they are mere matters of procedure, and enacted entirely for the benefit of the respondent, this being a civil matter, they might be waived. In a matter of jurisdiction, I think there is no difference between civil and criminal matters; but where the question of jurisdiction does not arise, *Graham* v. *Ingleby* (2) shews that in civil cases such provisions may be waived. The question, therefore, is, what is the true construction of the Act, and I think we may properly hold that the jurisdiction of the Court depends on whether the amount in dispute is such as is within the jurisdiction of the county court, and on whether the form of a special case has been adopted, and that then, for the protection of the respondent, the appellant must give a notice of appeal and security. The only doubt I had was as to the negative words of s. 16; however, I think they may be fairly construed as applying only to the matters which give jurisdiction to the Court, and that they do not refer to the matters of procedure which are enacted for the benefit of the respondent.

Rule discharged.

Attorneys for appellants: *Learoyd & Learoyd, for W. Whitfield of Rotherham.*

Attorneys for respondent: *Rickards & Walker.*

(1) 5 H. & N. 415; 29 L. J. (M. C.) 108. (2) 1 Ex. 651.

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July 11.

WALKER *v.* SOUTH EASTERN RAILWAY COMPANY.
SMITH *v.* SAME.

Master and Servant—Railway Company—Malicious Prosecution—Reasonable and Probable Cause.

One of the defendants' servants, a constable, after the conclusion of a scuffle in a station-yard between some of the defendants' servants and other persons, wrongfully gave A. into custody on a charge of assaulting the defendants' servants.

By the defendants' regulations their constables were authorized to take into custody any one they saw committing an assault upon another in any of the stations, and for the purpose of putting an end to any fight or affray; but they were directed to use this power with extreme caution, and not if the fight or affray was at an end before they interposed:—

Held, that the defendants were not liable for the act of their servant, as the Court drew the inference of fact that the constable in giving A. into custody was not acting within the scope of his employment.

The defendants subsequently prosecuted A. unsuccessfully. In an action for malicious prosecution, A. put in evidence the depositions of the defendants' witnesses before the magistrate, which were such as, if previously known to the defendants, would have given them reasonable cause for entering on the proceedings; but no evidence was given, either by the defendants or A., to show whether the witnesses had previously made these statements to the defendants:—

Held, that as it is usual to interrogate witnesses as to their evidence before taking such proceedings, and as the burden of proof that there was no reasonable or probable cause lay upon the plaintiff, it must be taken that the defendants had reasonable cause for prosecuting the plaintiff.

B. refused to leave a station yard of the defendants, and a struggle thereupon ensued between B. and the defendants' servants, during which B. was wrongfully given in charge by a constable of the defendants', employed under the above rule:—

Held, that there was evidence for the jury that the constable was acting within the scope of his employment.

THESE were two actions for assault, false imprisonment, and malicious prosecution, heard before Kelly, C.B., at the Summer Assizes for Surrey, 1869, when a verdict was found for the plaintiff in each action, with damages on each head; and leave was reserved to the defendants in each action to move to enter the verdict on either or all the counts, the Court to draw inferences of fact.

Ballantine, Serjt., obtained a rule in each case accordingly.

Feb. 14. *Montague Chambers, Q.C.*, and *Baker Green*, shewed cause.

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Edward Clarke (*Ballantine, Serjt.*, with him), supported the rules.

The facts, which are of a complicated character, and the arguments of counsel, sufficiently appear from the judgments.

Cur. adv. vult.

July 11. The judgment of the Court (Willes and Montague Smith, JJ.) was delivered by

MONTAGUE SMITH, J. These cases, which were argued before my Brother Willes and myself, were tried together before the Lord Chief Baron at the last summer assizes for Surrey, and the verdicts were entered for the plaintiffs on all their causes of complaint, and damages separately assessed upon them. The Court has been placed in great difficulty in disposing of the rules, in consequence of the uncertainty of the facts and the circumstance that there was apparently no question put to the jury beyond this, whether they believed the evidence of the plaintiffs or the defendants. It must be assumed from the way in which the verdicts are found that the jury believed the evidence of the plaintiffs.

Walker's Action. The first cause of complaint in this action is, that, by order of the inspector at the station, the plaintiff was forcibly removed from the station, on the ground that he would not produce his ticket, and that great and unnecessary violence was used in expelling him.

The only ground of objection to the ruling of the Lord Chief Baron on this part of the case, as stated in the rule, is, "that the judge ought to have told the jury that, if not more than necessary force was used to remove the plaintiff from the station, the verdict should be for the defendants." It appears, however, to have been admitted at the trial, and taken as a fact throughout, that unnecessary violence had been used, and the learned judge was not therefore bound, nor, indeed, could he have been expected from the course the case took at the trial, to give this hypothetical direction to the jury. We think, therefore, that this ground of objection fails, and that the verdict on the first head of claim, on which the jury assessed the damages at 50*l.*, cannot be disturbed, and that so much of the rule as relates to this head should be discharged.

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The second ground of complaint is, that the plaintiff was given into custody by Antonio, a police-constable employed by the defendants, and imprisoned. It appears from the evidence of the plaintiff himself, that, after the plaintiff had been thrust out of the station, there was "a scuffle" in the station-yard between Antonio and other servants of the company and two persons, viz. Smith, the plaintiff in the second action, and one Murphy. According to the plaintiff's evidence, Antonio commenced the affray by suddenly striking out right and left, and knocking two persons down. It was asserted by Antonio, but denied by the plaintiff, that the plaintiff took part in the struggle against the company's servants, and assaulted them. Smith and Murphy were taken into custody. After the struggle, and after the plaintiff had left the station and was walking away, Antonio directed a metropolitan police-constable to take the plaintiff into custody, as one of the parties who had been engaged in the struggle; and he was taken to the police-station, and there charged by Antonio in the first instance only with being drunk; but, the police-serjeant refusing to take that charge, Antonio charged the plaintiff with assaulting him in the discharge of his duty, and he was thereupon detained.

The directions and instructions issued by the company for the guidance of persons employed by them as police-constables were put in evidence. The direction more particularly applicable to the present case is the 42nd, which runs in substance thus:—"Any one of the company's officers or servants who is a sworn constable for the district or place where he is on duty, may take into custody any one whom he may see commit an assault upon another at any of the stations, and for the purpose of putting an end to any fight or affray; but this power is to be used with extreme caution, and not if the fight or affray is at an end before the constable interposes." There are other injunctions requiring great caution to be observed.

The evidence of Smith, the plaintiff in the second action, was different as to the origin and details of the struggle; and it would seem that Walker was not present at the commencement of it. The Lord Chief Baron, as we understand, without leaving any other question to the jury than the credit of the witnesses, ruled that, if they believed the evidence for the plaintiff, the company were liable for the acts of their servants in giving the plaintiff in

custody and sending him to the police-station. We think this ruling is not sustained by the evidence applicable to this action. If Antonio had acted on behalf of the company, and in pursuance of the duty he was employed to perform, although he may by unnecessary violence or otherwise have abused his authority, or used a wrong discretion in the manner of its exercise, the company would be liable; because, although acting wrongly, he would have so done whilst acting within the general scope of his employment: *Seymour* v. *Greenwood*. (1) But, assuming this plaintiff's account of the matter to be true, there was evidence that the fact of the struggle in the station-yard between Antonio and Smith and Murphy, at least so far as this plaintiff is concerned, was brought on by a wanton and aggressive act of Antonio himself, and when, according to the plaintiff's statement, he was not apparently acting in the execution of any duty for the company; and, moreover,—and this goes to the root of this part of the action,—that the subsequent giving of the plaintiff into custody by Antonio was after the struggle was over, and when the plaintiff was quietly walking away. This act of giving the plaintiff into custody, if done according to the plaintiff's statement, appears to us to have been an act beyond the scope of Antonio's employment, and in contravention of his instructions, and therefore an act for which the defendants are not liable. We are disposed to draw the inference in fact that Antonio in giving the plaintiff into custody was not acting within the scope of his employment by the company, or on behalf of, or for the benefit of the company.

It was further contended for the plaintiff, that there was evidence that the company ratified the acts of Antonio, by allowing their attorney to appear before the magistrates to conduct the prosecution. But two points arise on the question of ratification: 1. There could be no ratification, unless the original act was in some sense done on behalf and for the benefit of the company: 2. The mere fact that the attorney of the company appeared before the magistrates to prosecute, without evidence that he knew of the circumstances of the imprisonment, was not alone sufficient evidence of ratification: see *Eastern Counties Ry. Co.* v. *Broom*. (2) The questions arising on these points were not submitted to the

(1) 7 H. & N. 355; 30 L. J. (Ex.) 327. (2) 6 Ex. 314; 20 L. J. (Ex.) 196.

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jury. But, as far as we are able to collect the evidence, it appears to us to be insufficient to establish a ratification. In the result, therefore, we think the verdict on this part of the case ought to be entered for the defendants.

The third head of complaint was for a malicious prosecution. The Lord Chief Baron held that there was no proof of probable cause, but reserved leave on this point to move to enter the verdict for the defendants. The depositions of Antonio and the other railway servants were put in at the trial; and they contain, as it seems to us, abundant evidence of violent assaults upon the servants of the company, and upon Antonio in the exercise of his duty as a police-constable. The advisers of the company, if made acquainted with these facts by those servants, might, we think, as prudent and reasonable men, have given credit to them, and acted upon the facts so communicated to them. We do not understand this to be disputed; and the ground of the Lord Chief Baron's opinion, in ruling for the plaintiff, seems to have been that there was no proof of any inquiry by the company into the facts, or any report made to them before the inquiry took place before the magistrates, so as to shew that they undertook the prosecution with a knowledge of the testimony their servants were prepared to give. But the onus to shew the absence of probable cause rests on the plaintiff; and in this case the plaintiff, according to a very common practice, put the depositions in evidence to shew this absence. He relied on this evidence to establish the absence of probable cause; and he certainly gave no proof that the defendants' legal adviser did not know of the evidence before the company undertook to prosecute. We should be disposed to infer, if necessary (until the contrary was shewn), that, according to ordinary course and practice, the attorney of the company would inquire into the evidence the witnesses were about to give before he examined them in court. The attorney may well be considered to be for such a purpose the representative of the company: and, when the facts stated in the depositions were communicated to him by the servants of the company, it appears to us he might, as a prudent and reasonable man, consider there was reasonable and probable cause for the prosecution: see *Lister* v. *Perryman*. (1)

(1) Law Rep. 4 H. L. 521.

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No questions were left to the jury on this part of the case, either upon the evidence to shew want of probable cause, or on the question of malice; and, the Lord Chief Baron having reserved the point for the Court, we think the rule, so far as it relates to entering the verdict for the defendants on the count for malicious prosecution, must be made absolute.

Smith's Action. In this action the complaints are for assaulting and beating the plaintiff, and also for giving the plaintiff into custody.

The facts are different in this action as to this head of complaint from those in the former action. It appears from Smith's statement, that he asked to be allowed to see the station-master: and it would seem, although it is not clearly stated, he wanted to remain in the station-yard. When in the yard, it appears there was a struggle, in which he took part, and, as he says, was beaten; and then, during the struggle, and before it was over, he was given into custody, Antonio, the police-constable of the company, being there at the time, and removed to the police-station, and there charged, in the first instance, with being drunk and refusing to quit the company's premises, and afterwards with assaulting the company's officers in the execution of their duty.

The evidence is very confused; and it is difficult to understand what really took place. The Lord Chief Baron, as we understand, ruled, without leaving any question to the jury, that the company were liable for the acts of their servants. The rule in this case, however, is moved on the ground only that the judge ought to have told the jury that the company were not responsible for the assault; and we understand, therefore, that it is reserved to us to say whether there was any evidence to go to the jury to support the plaintiff's case.

After considering the matter, we cannot say that there was not in this case some evidence fit to be laid before the jury that the servants of the company were acting within the scope of their employment, and on behalf of, and in pursuance of the authority given to them by, the company, although they may have committed abuse and excess in the course of the exercise of their duty. If, therefore, as we assume, the point left to us to determine is, whether there was any evidence to go the jury, we cannot say there

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was none, and we cannot see our way, upon the evidence as reported to us, to affirm the ground stated in the rule, that the judge ought to have told the jury that the company were not responsible for the assault. So much, therefore, of the rule as relates to this part of the verdict will be discharged.

With respect to the count for malicious prosecution, it stands on the same ground as that part of the case in Walker's action, and therefore the rule to enter the verdict for the defendants on that count will be absolute.

Rules accordingly.

Attorney for plaintiffs: *Harcourt.*
Attorney for defendants: *E. P. Cearns.*

July 11.

MOLLETT AND ANOTHER *v.* ROBINSON.

Principal and Agent—Contract by Brokers—Usage of Market.

6 Ex 250, 7 C P 95 90 1 C P D 375, 5 C P D 200 4 Q B D 346

The defendant employed the plaintiffs, tallow-brokers in London, to purchase fifty tons of tallow for him in the London market. Having orders to purchase tallow for several other persons, the plaintiffs bought of other dealers sufficient to cover all those orders, interchanging with them bought and sold notes in their own names, without disclosing their principals. By these notes the plaintiffs and their sellers became personally bound to one another for the due performance of the contracts. The plaintiffs then sent the defendant a bought-note signed by themselves as "sworn brokers," in which fifty tons of tallow were described as bought on his account, with the quality, price, &c., but containing no seller's name. This bought-note, except as to quantity, was in the same terms as the contracts between the plaintiffs and their sellers. There was no corresponding sold-note, and no such purchase as represented in the bought-note.

The sellers failed to deliver the tallow to the plaintiffs, who settled the matter in account between themselves and their sellers.

In buying the tallow in this way as an execution of the defendant's order, and in thus settling with their sellers, the plaintiffs acted in accordance with the usage of the market. The defendant was not aware of the usage, or of the way in which the tallow had been bought, until after he received the bought-note. When the defendant became acquainted with the real nature of the transaction, he refused to adopt it, or to accept tallow purchased by the plaintiffs in order to make delivery, and tendered to him in alleged performance of the order.

In an action for refusing to accept the tallow or to indemnify the plaintiffs:—

Held, by Bovill, C.J., and Montague Smith, J., that the defendant was bound by the usage, although ignorant of its existence, and therefore that he was bound to accept the tallow.

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Held, by Willes and Keating, JJ., that although a usage may control the mode of performing a contract, it cannot change its intrinsic character, and as the authority given by the defendant to the plaintiffs was to buy for him as brokers, and to sell to him as principals, the defendant was not bound to accept the tallow.

Affd in Ex Ch 1871 C.P. 146 Rev'd in H of L 1872 L.R. 80

First count of the declaration, that the defendant employed the plaintiffs as his agents and brokers to purchase for the defendant fifty tons of tallow, upon certain terms, and upon the further terms that the defendant would accept and pay for the tallow according to the contract, and would indemnify the plaintiffs against any liability or loss they might sustain by having made the contract for the defendant: that the plaintiffs did, in pursuance of the said employment, and upon the terms thereof, purchase fifty tons of tallow for the defendant on the 2nd of April, 1869. And upon the same terms the plaintiffs made a further purchase for the defendant on the 28th of April, 1869, of 200 tons of tallow. Averment of performance of all conditions, &c.: Breach, that, the defendant refused to accept and pay for the tallow, and the plaintiffs thereby became liable to take up the same, and sustained damage by reason of the price of tallow having fallen, and by having to incur expense incident to the re-sale of the same; and the defendant refused to indemnify plaintiffs against the said damage.

Second count, alleging a sale of the same tallow by the plaintiffs to the defendant, and a refusal to accept; and also a count for goods bargained and sold, money paid, money lent, interest, and money due on accounts stated.

The defendant traversed all the allegations in the first and second counts, and also pleaded exoneration and discharge; and to the rest of the declaration he pleaded never indebted, payment, and set-off. Issue thereon.

At the trial before Bovill, C.J., at the sittings in London after Michaelmas Term, 1869, it appeared that the defendant, a merchant at Liverpool, had on several occasions employed the plaintiffs, who were tallow-brokers in London, to purchase tallow for him in the London market; and, on the occasions in question, two specific orders were given by him, one for the purchase of 50 tons on the 2nd of April, 1869, and the other for 200 tons on the 28th of April in the same year, and which the defendant desired

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the plaintiffs to "book to him." The plaintiffs proceeded on each occasion to purchase tallow in the usual and ordinary course, which was, that, having orders to purchase tallow for other persons as well as for the defendant, they made contracts for the aggregate quantity which they were ordered to buy, with other persons desirous of selling tallow, viz. with Mr. Simpson on the first occasion for 150 tons, and on the second occasion with Mr. Simpson for 150 tons and with a Mr. Rayner for 200 tons, and regular bought and sold notes were interchangeably passed between the sellers and the plaintiffs on each occasion. The principals' names were not disclosed on either side; and by these notes contracts were made between the plaintiffs and the sellers, by which each became bound personally to the other; and the plaintiffs became personally and individually liable to the sellers for the fulfilment of these several contracts.

As soon as each of these contracts was entered into, the plaintiffs sent a bought-note, signed by themselves as "sworn brokers," to the defendant, in the form:—"Mr. Robinson. Bought for your account;" and then specifying the quantity of tallow as ordered by the defendant, with a description of the quality, price, and other terms of the contract, and which corresponded, except as to quantity, with the contracts which the plaintiffs had previously entered into with their sellers. After the receipt of these several bought-notes by the defendant, a correspondence took place, and several letters were written and signed by the defendant and sent to the plaintiffs in the months of May and June, in which he treated the bought-notes sent to him as contracts, and undoubtedly assented in writing to the terms of them, though he was not aware at the time that these bought-notes did not correspond with contracts which the plaintiffs had made with their sellers.

The price of tallow afterwards fell in the market, and one of the sellers to the plaintiffs, viz. Simpson, failed, and was unable to meet his engagements. The plaintiffs in the usual and ordinary course tendered delivery orders to the defendant for the quantity and description of tallow mentioned in the bought-notes which they had sent to the defendant, at the prompt-days; but the defendant refused to receive delivery of the tallow. The plaintiffs,

having then balanced and settled their outstanding contracts with their sellers, proceeded to sell out as against the defendant the specific tallow which they had so tendered to him, and claimed the difference or loss upon the contract price, which amounted to 362*l.* 4*s.* 5*d.*, for the recovery of which sum this action was brought.

Evidence was given on the part of the plaintiffs of an universal usage in the tallow-trade for brokers to make the contracts in their own names, upon which they became personally liable, and to make such contracts for the aggregate quantity of tallow for which they might have received orders, and then at the prompt-day to balance and settle the deliveries and payments with their sellers, and either to make deliveries to their principals, or, if delivery were not taken by them, to claim any difference which might arise from a fall in the market from the respective principals.

A verdict was taken for the plaintiffs for 362*l.* 4*s.* 5*d.*, leave being reserved to the defendant to move to enter a nonsuit; and leave being also reserved to the plaintiffs to amend the declaration in any way the Court might think fit, regard being had to the usage proved.

Sir John Karslake, Q.C., in Hilary Term, obtained a rule nisi accordingly, on the ground that the evidence given at the trial did not support the declaration, and would not support any amendment of the declaration which the Court would allow.

May 30; June 14. *Sir G. Honyman, Q.C.*, and *Watkin Williams*, shewed cause. The defendant, having employed the plaintiffs as brokers to buy tallow for them in the London market, authorized them to buy according to the usage of the tallow-trade there, and is bound to indemnify them for any loss arising out of the transaction; and, the usage proved being general, and not limited, as in *Sweeting* v. *Pearce* (1), to the trade of a particular locality or association of persons, the defendant was bound by it, though not shewn to have been actually cognizant of the existence of the

(1) 7 C. B. (N. S.) 449; 29 L. J. (C.P.) 265; in error, 9 C. B. (N. S.) 534; 30 L. J. (C.P.) 109.

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usage: *Lampleigh* v. *Brathwait* (1); *Sutton* v. *Tatham* (2); *Taylor* v. *Stray* (3); *Rosewarne* v. *Billing* (4); *Bayliffe* v. *Butterworth* (5); *Greaves* v. *Legg* (6); *Humfrey* v. *Dale.* (7) It is not necessary to consider whether there was a binding contract between the seller and the purchaser; it is enough that there is a binding contract between the plaintiffs and the defendant. The count for money paid is clearly sustainable, on the authority of *Brittain* v. *Lloyd.* (8)

Sir John Karslake, Q.C., and *Cohen*, in support of the rule. The usage relied on is one which in terms contradicts the contract on the face of the bought-note. The bought-note, which is the contract between the parties,—*Fawkes* v. *Lamb* (9),—would convey to the buyer that the brokers, his agents, had bought tallow for him of some principal who would be responsible to him for the due fulfilment of the contract, whereas the usage sets up a contract in which the plaintiffs, though taking commission as brokers, are in reality the principals. No doubt a broker may make himself personally responsible as between himself and the seller, if there be a usage to warrant it, known to both parties: *Cropper* v. *Cook.* (10) But here the plaintiffs were employed strictly as brokers, and they so describe themselves in the bought-note. The term "broker" has a well-recognized meaning; he is a middle man employed to negotiate a binding contract between the two principal contracting parties: Story on Agency, § 28; *Schmaltz* v. *Avery* (11); *Hall* v. *Janson* (12); *Kirchner* v. *Venus.* (13) *Bostock* v. *Jardine* (14), shews that, apart from custom or usage, the plaintiffs here could have no locus standi.

Cur. adv. vult.

(1) 1 Sm. L. C. 147, n., 6th ed.
(2) 10 Ad. & E. 27.
(3) 2 C. B. (N. S.) 175, 197; 26 L. J. (C. P.) 185, 287.
(4) 15 C. B. (N. S.) 316; 33 L. J. (C.P.) 55.
(5) 1 Ex. 425; 17 L. J. (Ex.) 78.
(6) 11 Ex. 642; 23 L. J. (Ex.) 228: affirmed in error, 2 H. & N. 210; 26 L. J. (Ex.) 316.
(7) 7 E. & B. 266; 26 L. J. (Q. B.) 137: in error, E. B. & E. 1004; 27 L. J. (Q.B.) 390.
(8) 14 M. & W. 762.
(9) 31 L. J. (Q.B.) 98.
(10) Law Rep. 3 C. P. 194.
(11) 16 Q. B. 655; 20 L. J. (Q.B.) 228.
(12) 4 E. & B. 500; 24 L. J. (Q.B.) 97.
(13) 12 Moo. P. C. 361.
(14) 3 H. & C. 700; 34 L. J. (Ex.) 142.

The Court being equally divided, the judgment of Bovill, C.J., and Montague Smith, J., was delivered by

BOVILL, C.J. The judgment I am about to deliver is that of my Brother Montague Smith and myself. [His lordship, after stating the facts (ante, p. 647), proceeded as follows:—]

It could not be contended by the plaintiffs with any chance of success that the contracts made by the plaintiffs with their sellers for quantities of tallow different from those which they were instructed by the defendant to buy, and which never were intended to be specifically appropriated to the defendant, were contracts which bound the defendant, and upon which he could either sue or be sued; and, independently of any usage in the tallow-trade, the case would have stood simply upon the fact of the plaintiffs having been employed to purchase particular quantities of tallow for the defendant, and having omitted to make any contracts that were binding upon or could be enforced by the defendant; and, unless the bought-notes signed by the plaintiffs and sent to the defendant and the defendant's letters could be considered as establishing a valid contract or contracts between the plaintiffs and defendant, the plaintiffs would, under those circumstances, as it seems to us, have been without remedy against the defendant.

The plaintiffs, however, relied upon an universal usage in the tallow-trade, which was clearly proved, and which was for brokers to make the contracts in their own names, upon which they became personally responsible, and to make such contracts for the aggregate or any quantity of tallow which they might have orders to buy, and then at the prompt-day to balance and settle the deliveries or payments with their sellers, and either to make deliveries to their principals, or, if deliveries were not taken, then to claim any difference from the respective principals, precisely as was done in this case.

This practice and usage no doubt arose from the nature of the trade, which is of a very speculative character; and parties are in the habit of making contracts, as in this case, for forward deliveries, in order to take advantage of any change in the market-price. Indeed, the speculations in tallow are very much in the nature of the ordinary speculations on the Stock Exchange. In

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this case the usage and custom of the tallow-trade was very clearly and distinctly proved, the business was transacted precisely in accordance with such usage in all respects, and it resulted in the loss upon the tallow from the fall of the market which has been already mentioned. A verdict was entered for the plaintiffs at the trial, and I reserved the point whether they were entitled to recover.

The case has been very ably argued; and it was principally contended on the part of the defendant that this usage or custom could not be introduced into or alter the case; or, if it could, then that such usage and custom were bad, as being contradictory to the terms of the plaintiff's employment by the defendant, which, it was contended, was simply to make a binding contract for the purchase of tallow for the defendant, and which he might enforce against the sellers.

There is no doubt that transactions of precisely the same kind as those in the present case have taken place for many years in the tallow-trade, and probably in many other trades, where it is not the habit to disclose the names of principals. A very similar operation takes place in many foreign ports, where the agents abroad are in the habit of receiving orders from various parties to purchase the produce of the country, and are obliged to collect it in small quantities, as it is brought down to the port for shipment; and, buying it in their own names and on their own credit, and without reference to any correspondent in particular, they afterwards distribute it amongst their correspondents from whom they had orders to purchase, in such manner as they think right, charging only the price they have paid, or an average of it, and their commission: and we should be very unwilling to say that such usages, which have so long prevailed, cannot be supported, or that effect is not to be given to them in a Court of law.

It seems to us that the usage which was proved here must be imported into and considered part of the transaction in this case; and, although the defendant was not aware of it, yet that, having employed the plaintiffs to transact the business for him in the London tallow-market, he is equally bound by the usage of such market as if he had been acquainted with it. If he had known the usage, and with that knowledge had instructed the plaintiffs to purchase tallow for him, we cannot doubt that he would have been bound to make good to the plaintiffs the loss arising from

his refusal to accept the tallow; and, if he is bound by the usage, as we think he is, by employing the plaintiffs to transact the business for him in the London market, although he was not aware of the usage, we think he is equally liable to pay the amount of the loss.

The general rule of law is, that persons who engage a broker to transact business for them in a general market, authorize him to do so according to the general and known usages and customs of that market, although they themselves may not be aware of them; and, if the business is transacted in the ordinary and usual course, the principals are bound by such usages and customs, whether they had actual knowledge of them or not. Assuming the defendant, then, to be bound by these usages in the present case, it seems to us that they would affect and determine the nature and character of the employment of the plaintiffs by the defendant, and which would amount to an employment of the plaintiffs by the defendant to conduct the business in the ordinary course and according to the usage, and that upon the same principle as persons who employ brokers to make bargains for them on the Stock Exchange have been held bound to indemnify them upon contracts into which they have personally entered, so we think the defendant is liable to pay the plaintiffs the loss arising from his refusal to take the tallow, and from the fall of the market in the present case. If the defendant be bound by the usage, then the employment was to make contracts and conduct the transactions in accordance with the usage, and would amount to a request to do everything that was usual in the ordinary course of such transactions, including a request to settle and pay any differences; and it is not disputed that these transactions were carried out precisely according to the usage.

With regard to the letters which were written and signed by the defendant, if there were no such usage as that which was proved, it seems to us that they would have little effect, inasmuch as they would only appear to recognize the fact of the plaintiffs having made contracts with other persons on his behalf; but, if the usage be introduced, as we think it may be, and the defendant is bound by it, as we think he is, then the inference which we should draw from the facts is, that the plaintiffs, having signed the bought-notes sent to the defendant, and not having disclosed the

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name of any principals, and in fact not having any principals for the particular contracts evidenced by such bought-notes, must be taken to intimate to the defendant by such bought-notes that they had bought on his account of themselves, that is, that they had personally sold to him, and made themselves personally responsible as sellers to him as the buyer upon such bought-notes, and then the defendant, being bound by the usage, and writing the letters which were put in evidence at the trial, must be taken to have assented to the terms of those bought-notes, so as to make contracts binding upon him as for sales and purchases between him and the plaintiffs, upon the terms of those letters.

The case seems to us in principle to be very similar to that of *Humfrey* v. *Dale* (1), in which, though my Brothers Willes, Martin, and Channell differed from the Court of Queen's Bench and the majority of the Judges in the Exchequer Chamber, it was held by both Courts that the defendants, who acted for undisclosed principals, notwithstanding they signed "as brokers," were liable upon contract-notes, by the usage of the oil-trade, as principals in the transaction. The general principle is also, we think, supported by the case of *Cropper* v. *Cook* (2) in this Court.

On these grounds, it seems to us that the plaintiffs are entitled to maintain their verdict, and that the rule for a new trial should be discharged.

The judgment of Willes and Keating, JJ., was delivered by

WILLES, J. So far as we can collect the material facts of this case, they are as follows:—

The defendant, a merchant at Liverpool, employed the plaintiffs, tallow-brokers in London, to buy for him a parcel of fifty tons of tallow, as to the proper execution of which order by the plaintiffs the question arises. There was another order to buy 200 tons, upon which the same question is raised. The plaintiffs, who had other orders from other employers, bought several lots of tallow in their own names, exceeding in all 250 tons, and sent a bought-note to the defendant, representing that they had bought for him, as brokers, of a principal, fifty tons as ordered. This he

(1) 7 E. & B. 266; 26 L. J. (Q.B.) 137: in error, E. B. & E. 1004; 27 L. J. (Q.B.) 390. 3 Jur. N.S. 213, 5 W.R. 191.

(2) Law Rep. 3 C. P. 194.

signed as broker. There was no corresponding sold-note, and no such purchase as represented in the bought-note.

The fifty tons were not delivered; nor did the sellers deliver any tallow; but it was written off in general account between the plaintiffs and the seller, upon which a balance was struck, and the market having gone down, the plaintiffs paid or allowed the difference. All this was according to the usage of the London tallow-trade; but that usage was unknown to the defendant; and, upon his becoming acquainted with the real character of the transaction, he refused to adopt it or to accept tallow purchased by the brokers in order to make delivery, and tendered in alleged performance of the contract; whereupon this action was brought, either for not accepting or an indemnity. It is not necessary to make any remark as to the correspondence between the parties subsequent to the sending of the alleged bought-note, beyond pointing out that, as it took place in ignorance on the defendant's part of the usage, and of what was actually done by the plaintiffs, it could not amount to acquiescence or ratification: *Wall* v. *Cockerell.* (1) Nor do we stop to criticise the pleadings; but assume the existence of any count to raise the question of liability.

At the trial, the plaintiffs had a verdict for the difference in price, subject to leave reserved to enter a nonsuit, and a rule nisi was granted, which rule was argued in last term before the Chief Justice, Justices Keating and Montague Smith, and myself. It appears to my Brother Keating and myself that the rule ought to be absolute to enter a nonsuit. A broker is entitled to indemnity only for what he does within the limit of his authority. Here, the authority of the brokers was to buy as brokers for their principal, not to sell to him. If the sale had been consummated in the course insisted upon by the brokers, the principal would have obtained goods and paid for them; that is, would have *bought* them. Of whom? Of his own brokers, and no one else. That ought not to be, without the knowledge and consent of the principal. It is an axiom of the law of principal and agent, that a broker employed to sell cannot himself become the buyer, nor can a broker employed to buy become himself the seller, without distinct notice to the principal, so that the latter may object if he think

(1) 10 H. L. 229.

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proper. A different rule would give the broker an interest against his duty, to pass off a bad bargain or inferior goods.

It is also an elementary proposition, that a custom of trade may control the mode of performance of a contract, but cannot change its intrinsic character. It may regulate as extrinsic what is done in the market, where the contract does not provide otherwise. It cannot overrule what is agreed upon between the parties, whether intrinsic or extrinsic. The agent may perform the business he is engaged for according to the usages of the market in matters of detail, although the principal be unaware of such usage; because every authority to do a thing, not specifying the way, implies authority to do it in a reasonable way, which the usual way primâ facie is. But no usage unknown to the principal can justify a broker in converting himself into a principal seller.

There are cases in which an agent may do what is necessary to effect the orders of his principal. There is no such necessity in this instance. In point of fact, if the only orders in the brokers' hands had been those of this principal, the brokers would have pursued their authority and bought for their principal what the principal ordered; and there was nothing to prevent their in fact doing so in this instance, if they had thought proper. It is no excuse to say that it is all one to the principal, who supplies the goods. First, that is not true, because if before delivery the market had gone up, and the brokers had become bankrupt, their assignees, and not the principal, would have been entitled to the profit. Secondly, an agent who departs from his orders cannot bind his principal by shewing that what he did was equally good as, or even better than, what was ordered. The custom to send bought-notes ("Bought for you" so much, &c.), there being no corresponding sold-note, is a custom to misrepresent a fact as to which the bought-note signed as "brokers" amounts to an estoppel: see *Fairlie* v. *Fenton*. (1)

According to the alleged custom, whether the broker actually receives delivery or not, he can make his principal accept tallow procured anywhere by the broker, or of the broker's own; which is inconsistent with the character of agent.

The cases mentioned in the course of the argument, of which

(1) Law Rep. 5 Ex. 169.

Feise v. *Wray* (1) is one, in which a merchant orders a correspondent abroad to procure and ship for him a cargo at a certain limit, are not cases of employment of a broker. The ultimate seller and ultimate buyer intend to deal as such respectively with the agent to procure and forward. The character of the transaction, as being one in which the correspondent acts for a foreign principal, is evidence that he is intended to be the principal buyer, and responsible as such. The payment is usually stipulated to be made to him either in general account between him and the person who gives the order, or against the bill of lading, in which he is the consignor; and all this is known to both parties. The case of *Bostock* v. *Jardine* (2) is substantially in point; for, the usage, or rather loose practice, there was the same as in the present case, and it did not prevail.

Upon principle and authority, therefore, we think the rule ought to be made absolute to enter a nonsuit. But, as the Court is equally divided, the rule drops, and the verdict stands.

No rule. (3)

Attorneys for plaintiffs: *Thomas & Hollams.*
Attorneys for defendant: *Simpson & Cullingford.*

LORD LECONFIELD AND OTHERS, APPELLANTS; LORD LONSDALE, RESPONDENT. *July* 16.

Salmon Fishery Act, 1861 (24 *& 25 Vict. c.* 109)—*Legality of Fishing Weir—Non-navigable River*—17 *Ric.* 2, *c.* 9—12 *Edw.* 4, *c.* 7—*Easement—Grant—Prescription Act*, 2 *& 3 Wm.* 4, *c.* 71.

The provisions of Magna Charta and of the other early statutes (including 17 Ric. 2, c. 9, and 12 Edw. 4, c. 7), which prohibit weirs, apply only to navigable rivers.

Rolle v. *Whyte* (Law Rep. 3 Q. B. 286) followed.

Section 12 of the Salmon Fishery Act, 1861, prohibits the use of fishing mill-dams for the purpose of catching salmon, except such fishing mill-dams "as are lawfully in use at the time of the passing of this Act by virtue of a grant, charter, or immemorial usage."

A fishing mill-dam was erected between 1741 and 1751, in a river above the

(1) 3 East, 93.
(2) 3 H. & C. 700; 34 L. J. (Ex.) 142.
(3) See ante, p. 472, as to the effect of a dropped rule.

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flow of the tide, and where the river was not navigable. For sixty years before 1861, and as far back as living memory could go, it had been used in substantially the same way as it was used in 1861.

On appeal from the Fishery Commissioners:—

Held, that the fishing mill-dam was not a public nuisance.

Held, further, that, as a grant may be proved either by production of the grant itself or by evidence of enjoyment consistent only with the existence of such a grant and from which it may be presumed, the commissioners were bound, on the evidence, to find that the right to the fishing mill-dam existed by grant from all the proprietors whose interests could be affected by the fishing mill-dam, and consequently that the fishing mill-dam was "lawfully in use" at the time of the passing of the Salmon Fishery Act, 1861, "by virtue of a grant," within the meaning of s. 12 of that statute.

Semble, that the claim to such a fishing mill-dam is within the Prescription Act, 2 & 3 Wm. 4, c. 71.

CASE stated by the Special Commissioners for English Fisheries, pursuant to the Salmon Fishery Amendment Act, 1865 (28 & 29 Vict. c. 121), which (s. 45) incorporates 20 & 21 Vict. c. 43.

2. At a court held on the 10th of December, 1868, by the commissioners at Workington, in Cumberland, for the purpose of inquiring into the legality of the fixed engines for catching salmon, and all fishing weirs and fishing mill-dams situated in the river Derwent, in the county, the respondent appeared and claimed to use a coop situate at Salmon Hall, near Workington, as being legal, and other parties having appeared to oppose the claim, the commissioners made an order declaring the coop to be legal, subject to certain alterations hereinafter mentioned. Whereupon the appellants, who opposed the claim, duly applied to the commissioners for a case for the opinion of the Court of Common Pleas, and the commissioners stated the following case:—

3. The coop is a fishing-box or apparatus inserted in or forming part of the structure of a dam built across the river Derwent, the dam being used to pound and divert the water, partly for the purpose of fishing and partly for the purpose of supplying two mills with water to drive their wheels, one being the Salmon Hall mill and the other the Barepotts Iron Forge mill. The dam in question is built diagonally across the whole river from bank to bank, there being an island which subdivides the river there into two branches. Before 1861 there was one coop called the "upper coop," situated in the branch of the river next the left bank, and another coop called the "lower coop," situate in

the branch of the river next to the right bank. Since the passing of the Salmon Fishery Act, 1861 (24 & 25 Vict. c. 109), the lower coop has been closed up altogether by a sluice or shutter, and the upper coop has been reduced in width, part of its original width being converted into a fish pass, so as to comply with the 12th section of the Salmon Fishery Act, 1861. Before the Act of 1861 there was no gap or aperture in the dam to permit fish to pass up or down the river during the fishing season.

4. The condition under which salmon exist in rivers so as to admit of riparian owners and the public exercising their respective rights are as follows. This kind of migratory fish can only exist by alternately living in salt and fresh water. The fish are bred in the upper and shallow waters of rivers and their tributaries; about the age of eighteen months the young fish pass down to the sea, and the rest of their existence is spent in passing every year to and fro between the sea and the upper fresh streams. At all times of the year the fish are either passing up or down the river; the greater number pass up in the summer months, but there are generally some passing up or going down at other times also. They are not bred, and cannot be bred, in the tidal parts of rivers, though there they are caught plentifully. The old fish cannot breed unless they get up into the fresh parts of the rivers, and the young fish cannot grow unless they get down from the fresh parts of rivers to the sea, and are not worth catching in the fresh parts of rivers till they have first gone down to and then come up again from the sea. The old fish, after breeding in the upper parts of rivers, are also unseasonable and worthless until they have returned to the sea to recruit themselves. If the fish are either prevented from going up the river to breed or from coming down the river to grow and recruit, the stock perishes and becomes exhausted.

5. The object of a fishing-weir when erected in a non-tidal part of a river is to catch the fish by intercepting them in their migration up a river when they are generally in a valuable condition for use as food. A weir is a structure, sometimes made of solid masonry, with openings, in each of which a fishing-box called a coop, cruive, or trap is placed, which is so arranged that a fish going into it cannot get out. The part of the weir not occupied by the boxes is either of solid masonry, or of brushwood or network, and it is so high that

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fish cannot either get through it or jump over it, for the fish is by nature endowed with a limited power of jumping over obstacles placed in the current of a river. If the weir is too high for the fish to jump over, their instinct leads them into the aperture where the box or boxes are set.

6. The dam in which the coop at Salmon Hall claimed by the respondent is placed is a solid wall about four feet high, and alongside the whole of the top, and parallel with the top thereof, a wooden structure or framework is arranged, called "weir-hecks." These hecks are horizontal spars or bars of wood about one inch and a half apart lying in the same horizontal plane, each being parallel with the top of the dam and the bed of the river, being all kept together by crossbars, and the whole supported by strong upright posts driven into the bed of the river. The weir-hecks serve a twofold purpose, being a bridge leading to the coop from both sides of the river, and as they lie close to the top of the weir, though not resting upon it, they also prevent fish from jumping over the weir during their migration up the river, which they might otherwise do, and thus they are induced to go into the coop where they are caught.

7. The coop, or fishing-box, has sides consisting of spars or bars of wood similar to those forming the weir-hecks with spaces between each pair of spars or bars sufficiently wide to allow water to flow freely through them, but sufficiently close to prevent all but small fish going through and escaping. The up-stream side of the coop before 1861 consisted of spars or bars fixed horizontally, having spaces between each pair of spars or bars of one inch and a half, but since 1861 the bars have been placed vertically, and with a space between each pair of bars of two inches, in order to make them conform to s. 29 of the Salmon Fishery Act, 1861. Salmon will not pass through bars which are fixed horizontally, but will pass freely through bars of the same width apart if fixed perpendicularly.

8. The river Derwent is a salmon river of great value. At Cockermouth, which is about eight miles further up the river than Salmon Hall, the river receives a large tributary called the Cocker, and the upper parts of these rivers run through several large lakes, one four miles long, other two being each three miles long,

there being also smaller lakes, and beyond these lakes there are tributaries well adapted for the breeding of salmon, and which salmon frequent. The appellants are riparian owners on the banks of the said lakes and upper streams and tributaries of the river Derwent, and its tributary the Cocker.

9. When a fishing-weir is used in a river to intercept the fish in their annual migration up the river, those riparian owners, whose lands are situated above the weir, can only catch such fish as escape through or over such weir, and if the weir either intercepts all the fish going up the river or prevents those that are above going down to the sea, the stock of fish in the parts of the river above the weir, as well as below, becomes extinct, or nearly so.

10. The coop of the respondent situate at Salmon Hall is in a part of the river Derwent which is not navigable, and is about three miles from the sea, and about half a mile above the medium limit between the neap and spring tides.

11. The respondent is lord of the manors of Seaton and Stainburn, but not of the manor of Workington. The manor of Seaton commences from a point nearly half a mile above the coop in question, and extends down the right bank of the river to the sea. The manor of Stainburn commences from a point more than half a mile above the coop, and extends down the left bank of the river to a weir called the Workington Mill Weir, which is about 1500 yards below the coop in question. The manor of Workington extends from a weir called the Workington Mill Weir down the left bank of the river to the sea.

12–32. The evidence adduced by the parties, and the contention of each of them, were set forth in the case and will be found in the judgment of the commissioners, given hereafter, pars. 99–101.

33. The commissioners found as facts that the coop had been for the first time erected at Salmon Hall, between 1741 and 1751, and that for sixty years past, and as far back as living memory could go, it had been used in substantially the same way as it was in 1861, and that the dam and coops constituted a fishing mill-dam within the meaning of the Salmon Fishery Acts, 1861 and 1865.

34. They held, that the Solway Act, 44 Geo. 3, c. xlv., did not authorize the respondent to use the hecks of his coop horizontal or

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otherwise than of oval shape, but that this illegal user up to 1861 did not cause a forfeiture of his right if the right to use the coop had been otherwise legally acquired.

35. They also held for the reasons stated more fully in their judgment, which was annexed and to be taken as part of the case, that the coop was illegal and ought to be abated, and that they would have made an order accordingly, but for the case of *Rolle* v. *Whyte* (1), which they held to bind them, and in deference solely to such authority they made an order that the coop was legal subject to the conditions following, namely, that the present pass should be made level with the bed of the river, and that the weir hecks should be taken away or removed from the top of the weir to such a distance that fish would not be intercepted by them when either going up or returning down the river in passing over such weir.

36. The questions for the Court were—

(1.) Whether there were any of the statutes before 1861 referred to in the judgment which prohibited the owners of the banks of a non-navigable river from erecting a weir which prevented salmon from going to the upper waters flowing over the lands of the upper riparian owners?

(2.) Whether by virtue of the statutes referred to in the judgment of the commissioners, such a coop and weir were not prohibited by statute as contrary to public policy, and were not illegal up to 1861, and were not so now so far as the weir and coop hindered salmon from passing up and down?

(3.) Whether such a fishing weir or coop is an easement?

(4.) Whether such a fishing weir or coop is an easement within the meaning of the Prescription Act?

(5.) Whether on the facts found in the case the commissioners were justified in making the order that this coop was legal subject to the alterations mentioned in their order, or whether they ought not to have made an order to abate the coop?

If the Court should be of opinion that on one or other of the grounds above stated the judgment was erroneous in whole or part, the case was to be remitted to them, that they might make their order accordingly.

(1) Law Rep. 3 Q. B. 286.

The Judgment of the commissioners referred to in par. 35 of the case was as follows:—

1. *Danger of false analogies in law.* The judgment in this case was postponed, in the expectation that some appeals from the judgments of the commissioners in other cases then pending might throw light on many obscurities attending the present state of the law. A decision of the Court of Queen's Bench in *Rolle* v. *Whyte* (Law Rep. 3 Q. B. 286) has since been given; and it falls to be considered whether that decision furnishes the desired guide for the future disposal of these questions. The first observation which suggests itself on that decision is, that more than half the materials for arriving at a correct conclusion seem not to have been present to the view of the Court, and certain matters of fact seem to have been assumed as the latent basis of the conclusions of law, which are not reconcileable with ordinary experience and the previous authorities. These considerations place us in no small difficulty for the future.

2. When a new subject comes before a court of law, it is of vital moment that the matters of fact involved be correctly appreciated, for otherwise the Court may be misled by some false analogy. We are told on high authority (Lord Westbury on Revision of the Law, H. L. June 12th, 1863), that, when the liability of provisional committeemen, which was a new subject, came to be dealt with within the last quarter of a century, the judges at first all assumed that a provisional committeeman was on the footing of a partner, and it took many years of misdirected litigation before it occurred to an eminent judge to question the analogy altogether; and the House of Lords at last ultimately settled that it was a false analogy which had been at first adopted and acted upon. This arose from overlooking the essential matters of fact underlying the case. So "in applying a rule to the rights of running water," as Parke, B., says in *Embrey* v. *Owen* (6 Exch. 353, 368), "it must be considered what the nature of those rights is, and what is a violation of them."

3. *Necessity of knowing the law before* 1861. It is obvious that until the principles of the law bearing on the legality of fishing-weirs in non-navigable rivers previous to the year 1861 be thoroughly explored and ascertained, no satisfactory progress can be made in settling the many intricate and complicated questions now awaiting solution. The first step towards sound legislation is an exact knowledge of the antecedent law. Until that is attained, the legislature may legislate in vain, and only further confuse a subject already too much confused. What is wanted on the part of the legislature is a firm hand in dealing with these complicated rights; but it is impossible this can be acquired without an accurate knowledge of the law antecedent to 1861. In that year a statute was passed, which is so expressed that, if interpreted in the way suggested by the case of *Rolle* v. *Whyte* (Law Rep. 3 Q. B. 286), it may prove a retrograde step, and damage incalculably the rights of all the riparian owners in the kingdom, as well as the public, instead of strengthening and protecting them, as was its professed object. The time has therefore arrived for going back upon first principles, and endeavouring to lay sure foundations, so that there may be no legislation in the dark. Another consideration which shews the expediency of reviewing at this stage the whole of the antecedent law is this, that it is only within the last quarter of a century that the law relating to easements in running water, with

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which branch of the law fishing-weirs are closely connected, has obtained a large development, few of the judgments before that period being capable of being quoted without considerable qualifications.

4. *Judicial knowledge of facts.* It is therefore expedient to begin at the beginning of the subject, and to state the essential matters of fact on which the law is founded. A court of law is bound to know the ordinary laws of nature, at least such parts of these as form what is called common knowledge. It may also be assumed that a court of law is bound to know as much of the laws of nature as the statutes shew or assume to be material.

It is true that, if matters of fact cannot be understood without a knowledge of scientific rules, these must be brought before the court in the ordinary way by evidence; but a court of law has no right, where a matter is not within judicial knowledge, to surmise a state of facts which has not been made matter of extrinsic evidence one way or the other, especially when that assumed state of facts is contrary to what may be easily proved to be the true state of facts.

5. *Knowledge of facts necessary before law can be applied.* The essential matters of fact to be kept in view in applying the law to the right of fishing in running water are as follows, and these are either to be gathered from a perusal of the statutes which have been passed during six centuries on the subject, or they are capable of easy proof in the ordinary way. Nearly all the great rivers of England are frequented by salmon, a species of migratory fish which can only exist by alternately living in salt and fresh water. The law of their nature is, that the fish are bred in the upper and shallow waters of the great rivers and their tributaries, and at the age of about eighteen months they pass down to the sea, and the rest of their existence is spent in passing every year to and fro between the sea and the upper fresh streams. At all times of the year the fish are either passing up or passing down the river. It is true the greater numbers pass up in the summer months, but there are generally some passing up or going down at other times also. They are not bred at all and cannot be bred in the tidal parts of rivers, though there they are caught plentifully.

6. To enable the fish to inhabit a river, that is to say, to be found not only in the fresh but the tidal parts of rivers, it is thus essential that the parent fish should have an open passage from the sea to the source, or at least to the upper shallows of the river. The old fish require to go up the river to breed, and the young fish require to come down the river to grow; and after they are grown they still require to alternate between the fresh waters and the sea. If at any point between the tidal limit and the upper breeding grounds a barrier is made which obstructs this passage, the stock of fish is necessarily diminished and gradually annihilated. It thus follows that at the place where the salt water meets the fresh the whole stock of fish of the river and estuary must pass at least once in their lives, either coming or going. This is so in a state of nature, irrespective of all laws. If all the fish must pass a particular spot, it equally follows that they may all with certainty be caught at that spot if certain obvious means for that end are used.

7. *Common law as to catching fish.* Now, the common law (putting aside all statutes for the present) as to the catching of fish is this. The running water is publici juris, and belongs to no one. In the sea and tidal parts of rivers the public have the right of catching all the fish they can by all means

which are not inconsistent with the equal rights of each other. In the upper parts of rivers the public cannot go to fish, for they would be trespassers, each riparian owner having the exclusive right of catching all the fish he can up to the centre or medium filum of the river adjacent to his own land. But each riparian owner has, ex jure naturæ, only the right to fish in such a way that all the other riparians may be able to fish in the same way, for otherwise each would not have that usufruct of the running water which the laws of all civilized countries allow to him. And a fishing-weir is obviously an excessive and immoderate user of the running water, and involves a tort to the other riparians. There is, however, still a part of the river intermediate between the tidal flow and the upper fresh water, namely, where the river is navigable, but not tidal. In some rivers there are five to thirty miles of this navigable water which are not tidal, and in all that portion of the river the rule is that the public have the right of passage in boats and vessels, but have no right to catch fish. While navigating this part of the river, the public have no more right to dip a net or cast a fly than a passenger along the highway has a right to catch the game or dig the mines there: Vin. Abr. Prerog. B.a.; Davis, 56.a.; *Fitzwalter's Case* (1 Mod. 106); Hale, de Jure Maris, c. 2; *Murphy* v. *Ryan* (2 Ir. Rep. C. L. 143). The right of catching fish in the navigable and non-tidal part of the river belongs exclusively to the riparian owner, who has the same right precisely as to catching fish there as the riparian owners have in the non-navigable part of the river. It is thus clear that the right to catch fish does not depend in any way on the right of public passage. The public right of navigation and the public right of fishing are entirely separate rights. They are not concurrent rights, except in the sea and tidal parts of rivers; and even there it is well settled that, if the rights clash, the fisherman must always make way for the navigator, the right of navigation being the paramount right. This distinction between the right to fish and the right to navigate is important with reference to another part of the subject, as will be shewn hereafter, more especially as it seems to have been overlooked in the recent judgment in *Rolle* v. *Whyte* (Law Rep. 3 Q. B. 286).

8. *River and estuary unum quid.* Such being the state of things as regards the instincts of salmon and the common law right of fishing, it will be at once self-evident that the entire river from the sea to the upper breeding places is, so far as regards the purpose of maintaining and catching fish, unum quid,—one and indivisible. The whole area of water, or rather of the soil covered with running water, is merely a vehicle for holding the fish which permeate the water in all directions nearly at all times of the year for one purpose or another. While the water runs one way to the sea, the fish run the contrary way during at least half the year. If access to the breeding ground in the upper fresh waters is cut off, the whole stock perishes, and no fish are to be caught either there or in the tidal parts; if the fish are imprisoned in the upper waters and cannot get down to the sea, they also perish. The public may catch what they can in the tidal part of the river; the riparian owners may alone catch what are to be caught in their parts of the river. But each part of the river is inseparable from and dependent on the other; both must equally contribute to the one result, namely, the supply of fish in the whole river and estuary. If at any point the water is disconnected by a barrier and divided into separate compartments without any means of communication, some fish may exist, but migratory fish cannot exist.

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A paralysis ensues, and all the members of the river alike decay; the college of riparians suffer, and the public in the estuary equally suffer. This is, however, to be taken with this further distinction. If the riparian owner next to the tidal flow erects the barrier, he, having the key of the position, may destroy the whole stock of fish in the river and estuary, for all the breeding fish must pass his door. They cannot breed below him, and if they are to breed at all, they can only breed above and beyond him; but after breeding, before these can be caught, or are worth catching, they must first go back to the sea. As to those other riparians further up the river, it is with them a question of degree; the further up each is situated, his powers of mischief by erecting barriers are proportionably less, for there is always the chance, according to the size and nature of the bed of the river, that some portion of breeding ground between him and the sea will be left accessible to the fish, and to that extent the stock of fish will be kept from entire annihilation. The gradations of mischief and corresponding loss follow the geographical situation on the river; nevertheless, the whole river, including the estuary, is unum quid, and must be so viewed before a just estimate of the respective legal rights of parties interested can be formed. The running water must be a continuous medium open at one end towards the sea and stretching considerably inland at the other end, so that the interests of the public are inseparably mixed up with those of the college of riparian owners. The river and its dependent rights are most nearly analogous to a common, and each riparian owner can take his commonage only within the limits of his own land, yet the public have a right of sharing in the common at one end.

9. *How a fishing-weir operates on neighbours' rights.* Now, the mode in which a fishing-weir operates will be easily understood. A weir is, in general terms, a kind of fixed structure stretching across a river, the sole object of which is to make a barrier to the progress of the fish, and so as to compel them into certain places or apertures, in which traps, boxes, cruives, or coops are set, which confine and catch the fish. This barrier, which may or may not extend across the whole breadth of the river, is either of solid masonry or of brushwood, or it may be of any substance and texture sufficiently high and closely reticulated to stop the fish, and lead them into the apertures which contain the boxes or traps. Now, if this weir stops all the fish going up the river in the course of their annual migration, so that no fish ever reach that part adjacent to the lands of B., a riparian owner, it is obvious that this is a direct and immediate injury to B.'s riparian rights, for which an action on the case will lie. It is quite immaterial how far off the lands of B. may be from the weir, for distance is of no account in the migration of fish up and down a river; a hundred miles distance is the same as half a mile. Whether B.'s riparian lands are far or near, and whether or not there are any number of intermediate owners, the injury done to B.'s riparian ownership is equally direct and immediate. There may be gradations in the amount of damage done, according to the distance from the weir, for that will depend on the extent of breeding ground for the fish between B.'s land and the fishing-weir; but the cause of action is one and the same in all cases, and extends as far as salmon are in the habit of frequenting the river. It is enough that B.'s land is within the salmon-producing area of the water. Moreover, the injury done is not confined to the riparian owners between the weir and the upper end of the river. Precisely the same injury, though in a varying degree, is done to all the

riparian owners between the weir and the limits of the tidal flow. Each and every member of the college of riparians within the area frequented by salmon must have the same cause of action against the owner of the weir, though the amount of damage varies according to the circumstances and situation of each respectively. But there still remain the public who fish in the tidal parts of the river and the adjacent sea to be considered. These, also, are affected in precisely the same way as the riparians. The public franchise of fishing is a valuable right, and may be the means of livelihood to many. It is true the public have no right to go up the river and take fish with nets at the site of the weir, nor does the owner of the weir come down and take fish out of the tidal water frequented by the public fishermen; but the effects of the weir, nevertheless, extend into the area of the water used by and in the hands of the public. After a fishing-weir is erected, the public, no doubt, may still cast their nets where they have a right to use them, but they will cast them in vain. The salmon-producing power of the water is gone by virtue of the direct and immediate operation of this weir. To the public it is as immediate an interference as if the moment they hauled in their nets in the estuary the owner of the weir were to go down the river to where they are working and cut the nets before they reaped the harvest of their labour. The injury is the same in kind, though varying in degree. On this view the question arises, whether at common law, irrespective of all statutes, the erection of the weir is not a nuisance to the public. To hold it is not is to hold that a nuisance to the public cannot be committed by a person who does something on his own freehold, and so long as he does not do it on a highway, or close to it; yet most of the nuisances known to the law, whether nuisances at common law or declared to be so by statute, are nuisances committed on the party's own freehold, and it is as a general rule no answer to an indictment for nuisance that the thing constituting the nuisance or the immediate cause thereof was done or arose on the defendant's own freehold, if the public are engaged in some lawful purpose sufficiently near to be directly affected.

10. *How a mill-weir operates.* Such being the state of the facts as regards the operation of a fishing-weir in a non-navigable river on the rights of the riparian owners, and also on those of the public who fish in the tidal waters, it is next important to see how the owner of a mill stands in respect of injury to the lands abutting on a river frequented by migratory fish. A water-mill in the sense here used has a dam obstructing the flow of the water in its natural bed, and also a mill-leat or race attached to it, the object of both being to pond and divert the water so that when it reaches the mill the water may fall from a high to a low level, and by its momentum act as a motive power for machinery. In order to attain this end, the miller first builds a wall across the bed of the river to pond up the water, and the higher the pond which he can make the better it is as a motive power. He then diverts the water from this pond by means of a mill-race or leat to his wheel; and, after driving the wheel, the water is returned to the river by a continuation of the mill-race. The immediate effect of the mill-dam stopping the current of the river is to cause back water, or as it is called floodage, on the lands above. This floodage seldom extends beyond a mile up the river, and generally less. As regards the people situated below the mill, at least below the point where the diverted water, after driving the wheel, is returned to the bed of the river through the mill-race, there is no other effect or alteration visibly produced except occa-

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sionally a stoppage of the water while the mill-pond is being filled. All the water comes down to these as before. The miller does not use up the water. All he wants is volume or quantity; the quality or contents of the water are in general immaterial.

11. Now, the way in which the miller who first builds a dam stands as regards the riparian owners above and below him, is this:—Every owner whose land lies between the point to which the floodage caused by the dam extends, and the point at which the mill-race returns the diverted water to the original bed of the river, has a right of action against him. Those whose lands are flooded can sue him for the act of flooding their lands; those situated between the dam and the junction of the mill-race and river can sue him for the diversion of part of the river. And, if the land in which the mill-race or mill-leat is dug is not his own, or the right of aqueduct is not acquired, the owners of that land would also have a right of action against him. This right of action in these three cases exists though no actual damage is caused, and none need be proved; for, every riparian owner is ex jure naturæ entitled to have the volume of water passing his lands kept in its normal state and volume, subject only to the moderate usufruct of each of the other riparians; and the miller's dealing with the river is not a moderate usufruct in this sense. Those situated above the range of floodage have no interest whatever so far as regards the mere volume of water after it passes their lands, and nothing the miller lower down does or can do concerns them, for when it passes their land they have done with it. Those situated below the junction of the mill-race and of the river are also seldom affected by the mill, except on the rare occasions of the whole water of the river being detained while the pond is filling. The same quantity of water must ultimately come to them down the bed of the river and down the mill-race combined. These relations of the miller to his three neighbours constitute what is familiar to all lawyers as a milling easement, and is treated in this way. It is plain that a mill never can be built at all unless the miller make his peace with the few riparian owners above-mentioned who are situated between the extreme floodage limit and the junction of the river and mill-race, for they have a continuing cause of action against him. These alone are interested and damnified by the way in which the miller uses the mere volume of water in the river. And the rule is that, inasmuch as floodage and diversion and stoppage of water and aqueduct are effects patent to the eyes of the owners damnified, if they make no objection and let the miller alone for the period of twenty or at most forty years mentioned in the Prescription Act (2 & 3 Wm. 4, c. 71), he will ultimately acquire a right against them called an easement, and they will be for ever afterwards estopped from complaining of his mill, so far as floodage and diversion go. This easement becomes in effect a burden on the lands of those riparians, or at least is something subtracted from their natural riparian ownership; but, inasmuch as they have accepted it with their eyes open, they have only themselves to blame, and are taken by a court of law to have made an implied grant of the right. In this condition, namely, when the prescriptive period has run, the mill is often called an ancient mill, which merely means a mill as to which the owner has acquired this prescriptive right to flood and divert as against his immediate neighbours. In like manner, if the miller were to purchase all the land lying on both sides of the river between the floodage limit and the diversion limit, then he can set up a mill without anybody's consent or interference, so far as regards his using

the mere volume of water. No prescription is needed in that case. Now, in the books and reports of cases relating to mills, great confusion exists from not accurately distinguishing between these common easements and other rights which not only the owner of an ancient mill but every other riparian owner who has no mill equally enjoy, as against all persons who divert the current of their river and lessen its volume. It is often carelessly assumed that it is only the owner of an ancient mill who can bring an action against a person higher up the river for diverting the water. The truth of the matter is, that every riparian owner whose lands are washed by the river so diverted has precisely the same right of action as the miller, however ancient his mill may be,—the same right, neither more nor less,—the only difference between them and the miller being, that, while they may recover only nominal damages, the miller will recover substantial damages, because the actual damage to him is greater.

12. All that precedes relates only to the effect produced by a mill-dam, as regards this dealing with the volume of the water in a river and causing floodage and diversion, which every riparian owner has a common interest in resisting, for he is entitled to preserve the flow of water permanently in its normal state. But the effects produced as regards migratory fish frequenting that river are altogether distinct, and form a separate chapter of the law. While the books are full of cases all turning on the common easement as to diverting running water, and the effect thereof on the miller, there are few authorities bearing on the question as to the effect of mill-dams on that other riparian right equally stamped on the ownership of all lands abutting on rivers, and which is equally the right of the riparian owner, namely, the right ex jure naturæ to have the river maintained as a vehicle for the circulation of migratory fish, and correlatively the right of action against all who directly interfere with that right. That the right to catch fish, especially migratory fish, is a valuable right, and in general far more valuable right than the mere milling capability of the water, is self-evident; and, while water is not essential to mills, it is essential to the riparian owner who cultivates this valuable quality of running water, namely, its capacity to yield and maintain migratory fish. It is necessary, therefore, to consider how the miller stands with regard to the far more extensive range of owners who are interested in the migratory fish, and whose right of property, or rather right of catching them, existed long before the invention of mills, or even the foundations of laws of any kind. It being quite clear that the riparian owner has, à priori, the right to catch migratory fish, and to have the river kept up as a storehouse for migratory fish, and for bringing them to his land, the important thing is to discover when and by what lawful means and according to what legal principle that right comes to be taken out of him and transferred or surrendered to the owner of a weir which is set up artificially by the hand of man.

13. Now, some mills require only a mill-dam which goes half way across a river, or occupies part of the current. Such a mill-dam cannot possibly in any view interfere with any upper riparian owner's right, or with any public franchise of fishing for migratory fish; the fish having in that case always the means of passing up and down the river and past the end of the mill-dam, nothing more can be desired. Again, some mill-dams are only of moderate height, for example, abou three feet. This class of mill-dams again may be practically harmless, and may affect no riparian owner's interests of fishing, for this reason, that migratory fish

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have a limited power of jumping over obstacles placed in the beds of rivers, and as that height is within their ordinary powers it may be treated as practically the same thing as if the dam were not there. A third class of mill-dams, though of inordinate height, yet contain an aperture or fishway through which fish are also enabled in the ordinary course to pass up and down without much difficulty. This, again, does not interfere with the legal rights of other riparians. But there is a fourth class of mill-dams which are of inordinate height, and are constructed in such a way as to bar entirely the passage of migratory fish. It may be a question of degree in many cases as to the percentage of fish barred, taking into account occasional floods; but, wherever the mill-dam is so high as to materially impede the passage of fish, the principle must be the same, leaving out all trifling effects as falling within the maxim De minimis non curat lex. To see the effect of this impeding, it is only necessary to recollect, as already stated, that, before a migratory fish is in a catchable and marketable state, the old fish must have been able to go up to the upper shallows of non-navigable streams to deposit their spawn, and the fry after being hatched must have gone down to the sea and then come up again. If a fish has to go through all this preliminary migration before the riparian owner can exercise his right of catching it on his own land, the question is, whether any person who intercepts the migratory transit at any one point is not directly amenable to an action at the instance of each riparian owner. Whether the miller stop the parent fish on its way up the river to breed, or the young fish on its way down the river to the sea to grow, can make no practical difference. It is enough that, before the fish can in due course present itself "ready and willing" to be caught on the riparian's land, it has been in some way intercepted by the direct and immediate effect of the mill-dam being built of that height. Nor would it be any answer to an action at the instance of a riparian owner for the miller to say he was not thinking of fish in building his dam,—that all he wanted was to grind corn or spin wool, and did not know or care whether fish required to pass his dam or not.

14. In these circumstances, have the riparians a right of action on the case against the miller for obstructing them in the use of their fishery? The question has been already concluded in the affirmative so far as riparians above the mill-dam are concerned, by the cases of *Weld* v. *Hornby* (7 East, 195, 3 Smith, 244), and *Hamilton* v. *Marquis of Donegall* (3 Ridg. 267). But the question is, whether each and all the riparian owners whose lands are above and below the mill, and frequented by salmon, have not the same right of action. It is true there may be varying degrees of actual damage; but the right of action must be equally competent to all. And, how stands the miller as against the public? His dam, though situated on his own freehold, produces the same direct and immediate effect on the public who have the right of catching these migratory fish in the place where, above all other places, they are in the most fit state to be caught, namely, in the tidal part of the river. His dam prevents, or at least practically obstructs, them in the exercise of a lawful right, namely, that of catching the migratory fish in the estuary. Can it be said that, even though the dam is erected on the miller's own freehold, and is many miles up the river, where the public have no right to fish or to be, yet there is no nuisance caused to the public franchise, and no remedy, though the mischief is daily experienced and is most prejudicial to public rights? Distance and contiguity being of no account as to

migratory fish, how does it matter whether the dam is close to a highway, or in the tideway, or thirty miles off, if the effect is immediate and direct, as it may be assumed or proved to be? An indictment lies for causing noisome smells which reach a highway; for diverting a river so as to weaken a current of an estuary for navigation (1 Hawk. P. C., c. 75, § 1); and for making noises so as to frighten people and horses passing along a highway: *Rex* v. *Pease* (4 B. & Ad. 30).

15. Now, if a statute existed which conferred on the miller the right and authority to erect his mill-dam where it is, the consequence of that would be that the riparian owners and all persons would have to put up with all the incidental and natural consequences, however injurious and damaging these may be to any number of third parties and to the public. Thus, for example, when a railway is authorized by statute to be made, and sparks issue from the engine and set fire to fields of corn and plantations, it has been held that the owners of the corn and plantations must put up with the loss and have no remedy, because the legislature must have contemplated this as one of the incidents of a railway being made, and so it is treated as damnum absque injuriâ: *Vaughan* v. *Taff Vale Ry. Co.* (5 H. & N. 679; 29 L. J. (Ex.) 247); *Jones* v. *Festiniog Ry. Co.* (Law Rep. 3 Q. B. 733); *Fletcher* v. *Rylands* (4 H. & C. 263).

But, will anything short of a statute protect a miller from the consequences of his mill-dam on the fisheries above and below him? The authorities quoted shew that his ignorance or carelessness of the mischief he does to third parties is no defence to an action, or even though he used all due care in using his dam. And, even if he buy up the individual interests of all the college of riparians, can he buy up the interest of the public? and, if so, how? So far from there being any statute authorizing mills to be erected, all the statutes for the last six centuries are the other way, and put restraints on mills instead of encouraging them.

Mills are, per se, in no way more privileged than any other modes of industry. The butcher and the dyer and the farmer are just as highly favoured; and these trades are of precisely the same utility in the eye of the law as that of the miller. The miller, before he can set up his mill with safety, must first fight his way with the riparian owners who are within the range of his milling easement, that is to say, the persons whose lands are flooded above the dam, and the persons from whose lands the river is diverted below the dam, and also the persons in whose lands his mill-race is made. This comparatively limited area has already been defined. But, unless he make and maintain an aperture or fishway in his mill-dam for the migratory fish, he must still fight his way also against all the college of riparians whose lands are frequented by these fish, and also against the public in the estuary.

If there were any incompatibility between the exercise of a milling right on a river and the maintenance of the fishing rights of riparian owners, it might become a question for courts of law which of the two rights is to give way; but there is no such incompatibility. No mill is or can be materially prejudiced by the making and maintaining of a fishway in the dam, though it is often from interested motives otherwise represented.

The main reason why mill-dams are often found without a fishway is due to the fact that it is a little cheaper to make the dam without any aperture; and there is possibly a confused notion superadded, that an aperture causes danger to the stability of the structure, and also causes loss of water-power; both of which

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notions are almost entirely unfounded in point of fact; but, whether they are so or not, they resolve themselves into the question of expense, and, if made part of the original structure of the dam, that expense must always have been trifling in amount.

16. *Effect of both kinds of weirs.* It will thus be seen that a fishing-weir and also a mill-dam of exorbitant height erected on a non-navigable river frequented by salmon have precisely similar effects, and involve a direct and immediate legal injury on all the riparian owners above and below, and also on the public who fish in the estuary. The fishing-weir differs only from the mill-weir in catching the fish, and so far utilizing them while the breed lasts. The mill-dam wastes the present fish, as well as annihilates the breed, because it puts an end to the means of breeding. In both cases the question is one of annihilation of the breed after a few years, more or less; for, if the fishing-weir owner is left to do as he likes, he can annihilate the breed by catching and killing the present stock, and leaving none to ascend the river to spawn. It is true that, in most cases, from motives of self-interest, he does allow some fish to escape up the river; but, as this is not to benefit the other riparians, but merely himself, and he is almost entire master of the breed, his rights must be viewed as if they were exercised at their maximum, and with regard to what he may do or asserts a title to do, rather than with regard to what he actually does.

17. *Fishing mill-dams.* The weirs now spoken of are fishing-weirs and mill-weirs; but sometimes the two are combined, and in that composite state have been for purposes of classification called by the Fishery Act, 1861, fishing mill-dams, part of the structure being used for catching fish, and the rest for ponding up water for the mill. Now, any structure of this kind is in some respects unum quid; but as to most of its effects the same rule would primâ facie be applicable to it as if the two things so used in a certain mutual relation were entirely separated. As a general rule, even if the law of easements applied, which is taking the view most favourable to the owner, no alteration of its parts could be allowed, or one thing converted into another which in any way increased the injury to the other riparian owners, and it is quite possible that one of its parts may be or become legal and not the other; but, the component parts having been already fully described and dealt with, it is unnecessary at present to notice fishing mill-dams further.

18. *If any statutes restrain owners.* Now, all that has been said relates to the state of facts, and the legal rights thereby involved, without respect to any statute on the subject. The next question is, seeing that any riparian owner situated near the seaward end of the non-navigable part of the river may, almost without exciting notice or suspicion among his neighbours, set up a weir in the middle of his own lands, which may annihilate or damage the whole fisheries of that river or put them in his exclusive power, what is the relation in which he stands towards his neighbours and the public in the eye of the law? Under what legal category or denomination does the right which he thus exercises come? Without giving at present any name to it, it is expedient first to inquire whether the statutes have said anything on the subject, or have in any way controlled a right so remarkable and far-reaching in its mischief. It may be assumed that the right of catching migratory fish has been from all times, as it is still, a valuable right, giving in many instances great value to the land adjacent. It

may also be assumed that statutes are made to suit the circumstances of a country; and, if all the rivers of England are naturally adapted for and must have from all time maintained this kind of fish, one might reasonably expect to find some statutory provisions adapted to meet the case of riparian owners and the public, whose rights are so inextricably blended together that the folly or cupidity of any one may extinguish or seriously damage the rights of all the rest. But, of all the parties directly interested, the public are obviously most at the mercy of the riparian owners, who, having the exclusive possession of the only places where the fish can breed, can thus, if unrestrained by statute, inflict fatal injuries on the public, if they have not the means of self-defence.

19. *Early Scotch statutes as to weirs.* Before, however, referring to the English statutes, it may be well first to glance at the Scotch statutes. Scotland is similarly situated to England with respect to salmon rivers, and the same reasons which would lead the legislature in one country to interfere and control the owners and the public in the exercise of these common law rights exist in the other country.

About the twelfth, thirteenth, fourteenth, and fifteenth centuries there was a close communication between the sovereigns and great nobles of the two countries, some of the latter holding estates in both countries. The early laws have always been considered identical, the most ancient law treatise accepted in Scotland, called Regiam Majestatem, being a copy of Glanville's English treatise, which was written in the reign of Henry II. Hale (Hist. C. L. 219) says "many of the laws of Scotland hold a congruity and similitude, and many of them a perfect identity with the laws of England, at least as the English law stood in the times of Henry II, Richard I, John, Henry III, and Edward I." There happen to be records of the Scotch legislature preceding the date of Magna Charta by forty years.

The first statute in Scotland is dated 1175, in the time of William the Lion, and is as follows:—"This is the King's assize of waters, made at Perth by the Earls and Barons and Judges of Scotland on the Wednesday next before the feast of St. Margaret, that the midstream is always to be free to the extent that a swine of three years old, well fed, cannot touch either side with his head or his tail. And the water is always to be free, so that no man may take fish from the Saturday evening till the Monday at sunrise." "Hæc est assisa domini regis de aquis, recognita apud Perth die Jovis proxima antè festum Sanctæ Margaretæ, per comites et barones et judices Scotiæ, quod filum aquæ debet esse liberum usque quaque in tantum quod unus porcus trium annorum benepastus est longus ita quod neque grunnus porci appropinquet sepi nec cauda. Et debet esse liberum, ita quod nemo piscem ibi capiat à die sabbati, scilicet, post vesperas, usque in diem lunæ quando sol ortus fuerit." This statute, there can be no reasonable doubt, applies to fresh non-navigable rivers; and there is no embarrassment caused by any allusion to navigation. At that early date it lays down the rule that a fish-way is to be left open in all weirs, and there is to be a weekly close time.

20. Other statutes follow repeating and extending the same rules. An annual close time was declared by statute of an early though uncertain date to be from the 15th of August to the 11th of November (1 Thomson, Acts of Scotland, p. 388). Another statute, Robert I., 1318, enacted that "all those who have

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cruives or stanks or mills in waters where the sea flows and ebbs, or where salmon trouts, smolts, or the fry of any fish of the sea or of fresh waters ascends and descends, that each heck of the cruives shall be at the least two inches long and three inches wide, so that the fry of the fish shall have no impediment in passing up or going down, but that they may freely ascend or descend at all times." Another statute of 1424, c. 12, orders that all cruives and yairs set in tidal waters which destroy the fry be destroyed for evermore, and that each heck shall be three inches wide. Another statute was passed in 1469, c. 13, by which sheriffs of counties were to destroy and cast down certain instruments used. Again, the statute 1478, c. 6, declares that "each heck of the cruives shall be three inches wide as the old statute requires made by King David, and that the mid-stream be left free by the space of six feet, and he that does the contrary shall be indicted."

Another statute in 1489, c. 15, declares that "anent cruives and fish yaires which destroy the fry of fish and hurt the common profit of the realm, it is ordained that the acts and statutes made before be observed and kept; that letters be written to all sheriffs, baillies, and stewards, to destroy, cast down, and put away all the cruives within their bounds incontinent without delay. And anent the cruives that stand in fresh waters, that they stand not in forbidden time. And let the mid-stream be always free by the space of five feet, and the Saturdays slop be observed and kept as the act and statute made by King David requires, and that each heck of the said cruives be five inches wide according to the same statute. And for millers that set creeds and nets in dams, mill-leads, and waters, destroying red fish and fry of fish as said is, it shall be a point of dittay" (i.e. an indictable offence). Again, Acts passed, 1503, c. 72, and 1535, cc. 16, 17. In 1563, c. 68, "it is statute and ordained that all cruives and fish-dams that are within salt waters that ebb and flow be all utterly destroyed and put down, as well they that pertain to our sovereign lord as others, through all the realm. And, anent cruives in fresh waters, that they be made in such largeness and such days kept as is contained in the acts and statutes made thereupon of before, with this addition following, that is to say, that all cruives and yaires that are set of late upon sand and schaulds far within the water where they were not of before, that they may be incontinent taken down and put away." Again, Acts passed 1581, c. 111; 1594, c. 224; 1597, c. 265; 1600, c. 11; 1606, c. 5; 1685, c. 20. Lastly, in 1696, c. 33, there is this clause:—"And in respect that the salmon fishing within this kingdom is much prejudged by the height of mill-dams that are carried through the rivers where salmon are taken, His Majesty, with consent of the Estates of Parliament, ordains a constant slop (or gap) in the mid-stream of each mill-dam dike, and, if the dike be settled in several grains (or branches) of the river, that there be a slop in each grain, except in such rivers where cruives are settled, and that the said slop be as big as conveniently can be allowed, providing always the said slop prejudge not the going of the mills situate upon any such rivers."

21. The general effect of the ancient Scotch statutes on this subject was stated by the Lord Chancellor Westbury to be as follows,—*Hay* v. *Provost of Perth* (4 Macq. 535, 543): "The principles which these Acts embody, and the objects which the legislature sought to attain, were directed to three objects,—first, to insure to the salmon a free and unimpeded access to the upper fresh waters,

which are the natural spawning grounds of the fish; secondly, to secure the unimpeded return to the sea of the smoult or young fry of the salmon; thirdly, to prohibit the selling of unclean fish during the fence months. For the purpose of accomplishing these objects, which are clearly declared in various statutes from the very earliest times down to the latest, the statutes rendered it unlawful to erect any cruives or weirs in the waters where the sea ebbs and flows. Cruives and weirs were allowed in fresh waters, with certain limitations; one was that there should be a mid-stream, the width of which is carefully defined; the other that the hecks, as they are called, that is, the interstices between the wicker-work of the cruives, should be at least three inches wide. Fishing is also prohibited at mill-dams by any description of fixed nets or engine; and there is an enactment rendering it absolutely necessary that a free passage should be given both at the cruives and at the mill-dams in fresh water from Saturday evening to the rising of the sun on Monday morning. These are the objects which the statutes sought to accomplish."

22. *Early English statutes as to weirs.* We will now proceed to notice the English statutes on the same subject; and the earliest now extant is Magna Charta, c. 23, by which it is enacted that "all weirs from henceforth shall be utterly put down by Thames and Medway, and throughout all England, except by the sea coast." "Omnes kidelli deponantur de cetero penitus per Tamisiam et Medwayam, et per totam Angliam, nisi per costeram maris."

Now, the word "kiddel" here used is as applicable to non-navigable waters as to navigable (see Ducange, voce Kidellus), and there is nothing on the face of this enactment to restrict its operation to navigable rivers, the navigation not being stated as the reason for the enactment; and indeed the common law must have met the difficulty so far as navigation was concerned.

23. Coke, in his commentary on this chapter of Magna Charta (2 Inst. 38), does not expressly speak to the point, nor state the reason of the statute. Hale (de Jure Maris, c. 3, c. 5), without expressly saying that the statute was passed to protect navigation only, speaks only of its effect on navigation. But, if he considered the enactment confined to the protection of navigation, he must have overlooked another reason for its passing, inasmuch as a higher authority than Coke or Hale, namely, the legislature itself, in 12 Edw. 4, c. 7, speaking about 150 years before Coke's time, says this of Magna Charta:—"Whereas, by the laudable statute of Magna Charta, among other things, it is contained that all keddels by Thames and Medway and throughout the realm of England should be taken away saving by the sea banks, which statute was made for the great wealth of all this land, in avoiding the straitness of all rivers so that ships and boats might have in them their large and free passage, and also in safeguard of all the fry of fish spawned within the same." This may be taken as a legislative exposition of the meaning of the chapter of Magna Charta, and shews that the object was twofold, to protect navigation and to protect the spawn of all the fish, that the rivers might not be blocked up so as to prejudice either interest. But the navigable area, as already shewn, is not coterminous with the spawning or fish-catching area; and one might annihilate by means of a kidell all the migratory fish of the river without in the least interfering with navigation. The statute having a double object, and one object being, as far as we know, as important as the other, to hold that the kidells there prohibited meant only

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kidells in navigable waters, is to give little or no effect to one of the two objects contemplated by the statute. And we may be tolerably sure that in those feudal times, when fishing played a conspicuous part in the pleasures and business of life, that view of the subject would not be overlooked by our early legislators.

24. 13 *Edw.* 1, *st.* 1, *c.* 47. The next statute relating to fish is 13 Edw. 1, st. 1, c. 47 (1285), commonly called the Statute of Westminster the Second, and is the first statute now on record which declares a close season. It begins thus:—"It is provided that the waters of Humber, Owse, Trent, Done, Arre, Derewent, Wherfe, Nid, Yore, Swale, Tese, and all other waters wherein salmon be taken, shall be in defence for taking salmon from the Nativity of Our Lady unto St. Martin's Day, &c.: And in places where fresh waters be, there shall be assigned overseers of this statute, which being sworn shall oftentimes see and inquire of the offenders:" and penalties are declared for neglecting the statute. Now, this statute evidently has nothing to do with navigation. Coke says (2 Inst. 477): "Before the making of this Act, fishermen for a little lucre did very much harm, and destroyed the increase of salmons by fishing for them in unseasonable times, which were between the beginning of September and about the midst of November, and likewise for young salmons or salmon peals between the midst of April and towards the end of June, against both which provision is made by this Act. The word 'river' here signifieth the water or river running between the banks, be it fresh or salt. In this case it was necessary that such a commission should be granted for preservation of salmons and of their young, and for avoiding of the destruction of the same, being victual of great and precious amount, and what is more necessary than increase of victual? yet could it not be newly raised without Act of Parliament?" Hale (de Jure Maris, c. 5) also says expressly: "The statute extends to all rivers wherein salmons be."

No one can doubt that this statute put a great restriction on all the riparian owners of the kingdom; for, at common law, they could fish day and night all the year round, whereas this statute says they shall not fish at all for several months, which is a much greater restriction on private owners than the enforcing of a fishway through all the weirs on such rivers would be.

25. 25 *Edw.* 3; 45 *Edw.* 3. The next statute in point of time is 25 Edw. 3, st. 4, c. 4 (1350), which begins thus:—"Item. Whereas, the common passage of boats and ships in the great rivers of England be oftentimes annoyed by the enhancing of gorces, mills, wears, stanks, stakes, and kiddels, in great damage of the people, it is accorded and established that all such gorces, mills, wears, stanks, stakes, and kiddels, which be levied and set up in the time of King Edward, the King's grandfather, and after, whereby the said ships and boats be disturbed that they cannot pass in such rivers as they were wont, shall be out and utterly pulled down, without being renewed, &c." This statute recites only the injury done by the things mentioned to navigation, and therefore it may be conceded that this statute applies only to navigable parts of rivers. And the Courts have held that the effect of this statute, and also of the next statute to the same effect, namely, 45 Edw. 3, c. 2 (1369), was, to legalise all the weirs then existing in navigable rivers which had been set up before the time of Edward I, though at common law they must have been equally illegal before that date: *Williams* v. *Wilcox* (8 Ad. & E. 314).

It may be observed, however, of these two statutes of Edward III, that, though

they mention only injury to navigation as the mischief that led to these two statutes, they were understood at the period to have also been passed to put down weirs generally, because of the mischief they did to the fish. This appears from passages in the Rotuli Parliamentorum and Liber Albus, some of which will be afterwards referred to. (See post, §§ 51, 53, 55, 56.)

26. 13 *Ric.* 2, *c.* 19. The next statute is 13 Ric. 2, c. 19 (1389), touching the taking of salmon. It recites the 13 Edw. 1, c. 47, already referred to (antè § 24), which first enacted a close season. It adds a prohibition against using certain nets called stalkers in any water of the realm at any time of the year, and also all other nets or engines whatsoever by which the fry or breed of the salmons, lampreys, or any other fish may be in anywise destroyed. And this statute prescribes a different close season for the Lune, Wyre, Mersey, and Ribble. This statute also clearly applies to non-navigable rivers throughout all England "wherever salmons be."

27. 17 *Ric.* 2, *c.* 9. Then comes the important statute 17 Ric. 2, c. 9 (1393), which, after reciting the two previous statutes dealing with the close season, namely, 13 Edw. 1 and 13 Ric. 2, adds this:—"Which statutes have not been hitherto duly executed, for default of good conservators, as our said lord the King hath perceived by complaint to him made in this present parliament; wherefore it is accorded and assented that the justices of the peace of all the counties of England shall be conservators of the said statutes in the counties where they be justices, and that they and every of them at all times when they may attend shall survey the offences and defaults attempted against the statutes aforesaid." Then follows a new enactment:—"And also shall survey and search all the weirs in such rivers that they shall not be very strait for the destruction of such fry and brood, but *with a reasonable opening* after the old assize used or accustomed, and that the same justices or any of them which shall find default or abuse against the statutes aforesaid, shall make due punishment of them which be found in default, after the content of the same statute." Then the justices are authorized to employ sufficient under-conservators to assist in these surveys. In the current translations of this statute the original French words "mes de resonable ouverture" are erroneously rendered *but of reasonable wideness*, which translation misses the obvious sense. The translation of Rastall, in 1611, so renders the words, and succeeding editions copy it,—a transparent blunder which may be ascribed to the want of familiarity of the translator with the subject. The learned editor of the "Liber Albus," Mr. Riley, in translating the same original, correctly gives it as "reasonable opening."

28. This statute is important in several points of view. It for the first time takes advantage of the institution of justices of the peace, who had been recently then established by Edw. 3, and devolves upon them the permanent supervision of the statutes, an arrangement which, however, in the sequel has turned out unfortunate. The statute, which like the two previous statutes as to close time, clearly applies to non-navigable rivers, brings out for the first time the proper mode of dealing with weirs in non-navigable rivers, that is, all weirs, whether mill-weirs or fishing-weirs. There is no express saving, as in the statutes of Edw. 3, of those set up before Edw. 1. They are all to have a reasonable opening, in other words, a reasonable gap or fishway. The Scotch statutes had defined the exact size of such gap, namely, the size which allows a well-fed swine

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to turn round in, and also the size of the hecks; but this statute leaves both to the justices to regulate according to what is reasonable. The statute also refers to this "reasonable opening" as according to the old assize used or accustomed,—evidently pointing to some previous statutes not included in the ordinary collections of published statutes. We also learn from the Record Commissioners that there are many statutes which have never been printed, not to speak of those which have been lost altogether, and that the usual printed series, even the Record Commissioners' edition, includes only those statutes which the compilers of early days considered sufficiently interesting and important. In any construction of this statute it is sufficiently apparent that it amounts to a statutory prohibition of weirs which had not a reasonable gap or opening, and rendered it an indictable offence to keep them in that state, and punishable with fine or imprisonment. It must follow as a logical consequence that no one could set up after that date a weir without a reasonable opening; and no prescription could be pleaded in the face of that enactment so long as that statute stood unrepealed, which it did till 1861. Accordingly, it was considered one of the regular duties of justices of the peace to survey and search weirs on salmon rivers, as may be seen in all the old treatises and compilations treating of the office of justices of the peace. (Dalton's Justice of the Peace, 79 (ed. 1697); Lambard, J. P. 178.)

29. 1 *Hen.* 4, *c.* 12; 4 *Hen.* 4, *c.* 11. Up to this point there seems to have issued out of Magna Charta a double stream of statutes developing the meaning of the 23rd chapter relating to kiddels. First, there was a series of close season statutes for salmon, the first two of which, 13 Edw. 1, 13 Ric. 2, spoke of close season, and said nothing about weirs. The third statute just referred to, of 17 Ric. 2, expressly brought out the subject of weirs so far as concerned salmon, but said not a word about navigation.

The other stream of statutes, namely, 25 Edw. 3, and 45 Edw. 3, spoke only of injury caused by weirs to navigation, and said nothing about the injury they caused to fish; but, in the third navigation statute, namely, 1 Hen. 4, c. 12 (1399), after reciting the statutes of 25 Edw. 3, and 45 Edw. 3, it speaks of weirs, not only as injuring navigation, but "drowning, wasting, and destroying of meadows and pastures and lands sowed adjoining to the said rivers." The next statute of the same series, 4 Hen. 4, c. 11 (1402), over and above injury to navigation, first mentions the damage to fish also caused thereby, and begins thus: "Item. Because that by weirs, stakes, and kidels being in the water of Thames and of other great rivers through the realm, the common passage of ships and boats is disturbed, and much people perished, and *also the young fry* of fish destroyed, and against reason wasted and given to swine to eat, contrary to the pleasure of God, and to the great damage of the King and his people." The statute then directs the previous statutes to be put into execution, and that commissions be awarded to certain justices and others in every county to inquire, &c. It will be seen that the supervision of the navigation statutes is not yet devolved regularly on the justices of the peace, but a commission only is to issue to some of them to act pro hac vice.

30. 2 *Hen.* 6, *c.* 15. The next statute, 2 Hen. 6, c. 15 (1423), dealt with still a new subject, and begins thus:—"It is ordained that the standing of nets and engines called trinks, and all other nets which be and were wont to be fastened

and hanged continually day and night by a certain time in the year to great posts, boats, and anchors, overthwart the river of Thames and other rivers of the realm which standing is a cause of as great and more destruction of the brood and fry of fish and disturbance of the common passage of vessels as be the weirs, kidells, or any other engines, be wholly defended for ever;" provided the possessors of the trinks may fish with them, "drawing and pulling them by hand as other fishers do with other nets, and not fastening or tacking the said nets to posts, boats, and anchors."

This statute was obviously passed to meet the case of nets fixed, which probably were held not to come within the things previously prohibited, namely, weirs, mill-dams, &c. This statute at first sight may be thought to be mainly applicable to navigable parts of rivers, though it may well be doubted whether the allusion to navigation meant more than that that was a good reason for putting down such nets where navigation existed. But it is quite plain that a fixed net in the non-navigable part of a river would do much more mischief to migratory fish than a net fixed in the navigable parts; and the substantial part of the enactment was to put an end to fixing nets, and to make it lawful thenceforth to fish only with nets drawn and pulled by hand. Old statutes have always been construed more equitably and according to the mischief declared, than modern statutes are construed.

31. 12 *Edw.* 4, *c.* 7. The next statute is 12 Edw. 4, c. 7 (1474). This statute differs from the preceding series in being a solemn recital or review of the law from Magna Charta, and has the appearance of blending or consolidating the two previous streams of statutes as to fish already referred to (antè § 22). It begins with the recital that the 23rd chapter of Magna Charta was passed not only for protection of navigation, but for the safeguard of all the fry of fish spawned within the rivers; and, if the latter is one of the objects, it would naturally be expected not to be confined to the navigable parts of rivers only. This statute says that, "in affirmance of the said statute of the great charter, divers statutes have been after made and ordained, amongst which was the statute 1 Hen. 4." It then recites that statute of 1 Hen. 4 only, and not any of the others, and continues thus: "Contrary to which great charter and all the statutes aforesaid (that is, all the statutes made in affirmance of the Great Charter) in divers parts of this realm of England, both in the destroying of the fish as aforesaid, and in disturbance of the passages of ships, barges, boats, and other vessels, by divers and many people, divers fishgarths, mills, mill-dams, mill-stanks, locks, ebbing wears, stakes, kedels, hecks, or flood-gates, and divers other disturbances be daily enhansed, levied, and enlarged, to the great damage of our lord the King and of his faithful lieges. Our said lord the King, graciously considering the premises, by the advice and assent of the lords spiritual and temporal, and at the request of the said commons in this parliament assembled, and by authority of the same, hath ordained and established that the said statute of the Great Charter and *all other statutes* concerning the premises shall be duly observed and kept."

32. Now, this statute, unlike the previous ones relating to navigable rivers, gives so great prominence to the protection of fish that the fish are now mentioned first; and therefore the protection of fish may be taken to have been at least of equal value with navigation, and yet, if the operation of the statute be confined to the navigable area of rivers, it is quite plain, from the nature of the subject-

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matter, that the most important of all the fish in the eyes of the legislature would receive little or no protection. So to restrict the statute would be to impute a want of foresight and insight to the legislature of that age, which its previous familiarity with the habits of that fish renders very improbable. Moreover, this statute says, not merely that the only statute which is recited (that of 1 Hen. 4) is to be kept, but it says, "all other statutes concerning the premises" are to be kept, and one of those statutes, namely, 17 Ric. 2, beyond all doubt made it a penal offence, subject to fine and imprisonment, to keep a weir without a sufficient aperture for salmon to pass. The statute of 12 Edw. 4 goes on to say that, if after 1475, by judgment of the commissioners assigned by 1 Hen. 4 (i. e. persons to be appointed as justices to survey and keep the waters and correct defaults), it be found that such weirs, &c., are made or enhanced or enlarged, &c., the offenders shall have three months allowed them to amend and break down the same, failing which they are to forfeit 100 marks to the King. Then, over and above that enactment, there is a general enactment and prohibition against all persons (other than those whose weirs were condemned) continuing such weirs, &c., or other "disturbances or impediments as aforesaid." Disturbances or impediments to what? Not merely to navigation, for that is not the only care of the statute; but disturbances or impediments to the fish, and the great impediment as regards the migratory fish is the preventing them going up to the natural spawning beds of the river, which almost invariably lie beyond the area of navigation.

33. This statute of 12 Edw. 4, c. 7, was the last of the series of statutes passed in express affirmance of the Great Charter; and it is evidently intended, both from the preamble and its enacting part, to be comprehensive of all that went before, so far as regards weirs, and disturbances and impediments ejusdem generis, for the previous statutes had no general words following the particular words. Here there is an elaborate and enlarged list of things ending with general words which take in nearly everything that can be conceived to be an impediment or disturbance. Now, the question arises why the statute of 12 Edw. 4 should be confined to navigable rivers,—not that it makes much difference, as regards non-navigable rivers, because the statute of 17 Ric. 2 left no doubt on that point, and that and all other statutes are expressly confirmed by the statute of 12 Edw. 4. The supposed reason for confining this statute to navigable rivers, namely, because otherwise private owners would be restrained, is untenable, for they had already been restricted by the close season. But, according to the correct construction of the statute, nothing is *absolutely* prohibited; the things are merely prohibited pro tanto, so far as the mischief extends. No one, for example, could contend that stakes or mills were absolutely prohibited, if they neither destroyed the fish nor disturbed the passage of fish. This, which is the proper construction, will be afterwards more pointedly referred to. (See post, § 47.)

34. None of the authorities or text-writers expressly or clearly say whether the 12 Edw. 4 extends to non-navigable rivers. There is nothing in Coke's 2nd Inst. or in the *Chester Mill Case* (10 Co. 137), which necessarily implies more than this, that it confirms the 25 Edw. 3 and 45 Edw. 3, which cannot be denied; but it does not follow that it does not confirm other statutes, and it expressly says all other statutes are confirmed, and one of those other statutes was the 17 Ric. 2. Hale (de Jure Maris) does not expressly say that 12 Edw. 4 applies to non-navigable rivers, though it has been shewn that he lays it down that 13 Edw. 1,

and therefore 13 Ric. 2 and 17 Ric. 2, do apply to non-navigable rivers. It is said that Callis on Sewers lays it down that 12 Edw. 4 does not extend to non-navigable rivers. But his language, when closely examined, does not warrant this inference. He reviews the chief statutes as to navigable rivers in the quaint and now somewhat obscure style of his age. When he comes to the statute 1 Hen. 4, he says of it (p. 258):—"Here be two things, which none of the former statutes took order for. The one is the perishing of the King's people. The other the destroying of the fry of fish which were occasioned by the erecting of these weres, mills, &c. *Yet these are businesses which are otherwise provided for, and be not pertinent to these laws of sewers; and therefore I shall pass them over without any other further explanation thereof.*" So that Callis repudiates saying anything at all about the relation of weirs to fish, and says they are otherwise provided for. He then comes to 12 Edw. 4, and notices it thus (p. 259):—"It appeareth *that this statute* speaketh of mill-dams, locks, hebbing-weres, hecks, and flood-gates (and he ought to have added 'and other disturbances and impediments'), so in extent thereof it hath more enlargement. And, in my opinion, all the foresaid statutes did extend only to navigable streams and rivers with ships and boats." What is here meant by "foresaid statutes?" Foresaid to what? Does it include the present statute of 12 Edw. 4, which he is dealing with, and of which he has in the same sentence spoken in the *present tense*, or does it include the 12 Edw. 4? The natural meaning must be the former; for, if he meant the latter, he would have said: "And in my opinion this, *as well as the foresaid statutes*, doth extend only to navigable streams." And it is worth noticing that in all the indices to Callis this is so entered as his meaning. The first edition, dated 1647, has no index. The second edition, dated 1686, and subsequent editions, all have this entry as to the statute 12 Edw. 4, that it does extend to non-navigable rivers; as if translating the text into that meaning. Therefore, those who must have well understood the quaint language of Callis 200 years ago, and were better judges of what he meant than we can be in the present age, seem to have understood him to say, that, while the statutes of Edw. 3 and Hen. 4, which he had been dealing with, applied to navigable rivers, that of 12 Edw. 4, the one he was then dealing with, was more comprehensive, and applied also to non-navigable rivers. But, whether that be so or not, it cannot be said that Callis, who lived 200 years after 12 Edw. 4, had better materials than we at the present day have for interpreting that statute; and it is enough to say that 12 Edw. 4 confirmed all the previous statutes, and one of those statutes was 17 Ric. 2. Moreover, Callis expressly says that he does not profess to deal with the statutes relating to the preservation of fish; and, though he is a high authority on all subjects relating to sewers, there is nothing from the beginning to the end of his book to shew that he had given any special consideration to the subject of fisheries.

35. The statute of 12 Edw. 4 is the last of the continuous double chain of statutes issuing out of the 23rd chapter of Magna Charta; and, though the most important enactments are embodied in those statutes, still the series of statutes was continued, and it will be useful to notice those following it, if only as reflecting light on the earlier statutes. And, all the statutes being in pari materia, it is legitimate to use them as assisting and explaining each other.

36. 4 *Hen.* 7, *c.* 21. The next statute in chronological order is a local statute, and may be shortly noticed. The Act 4 Hen. 7, c. 21 (1488), which was an Act

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for the preservation of the fry of fish, begins thus: "Item, whereas divers statutes and ordinances for saving and keeping of fry and brood of fish in fresh rivers of this realm before this time have been made and ordained, but for saving and keeping of fry and brood of fish resorting out of the sea and salt waters into havens and creeks within the said realm, any ordinance general hath not been purveyed nor made, &c." Then the statute goes on to prohibit, under a penalty of 10*l.*, stall-boats fastened with anchors having with them unreasonable nets and engines, which take and destroy in Orford haven as well great fishes unseasonable as the said fry and brood to number innumerable, &c. This statute shews that there were already statutes for preservation of fry of fish in fresh rivers; and these must have been those already mentioned, which therefore must have been understood as fully providing for "fresh rivers."

37. 25 *Hen.* 8, *c.* 7. In 1533, 25 Hen. 8, c. 7, an Act was passed intituled An Act against killing of young Spawn or Fry of Eels and Salmon. Its recital is useful as embodying the common knowledge of the time, which ought now to be treated as part of the judicial knowledge, and is as follows.: "For as much as great hurt and daily inconvenience have and do ensue unto all the King's subjects of the realm, by the greedy appetites and insatiable desire which sundry of them occupying fishings have used by taking, killing, and destroying the young spawn, fry, or brood of eels and salmon, as well in salt rivers as in fresh rivers, lakes, splashes, fens, and marshes in many parts of this realm, to the no little hindrance and derogation of the common weal of the same, as also in killing of salmons when they be unseasonable and not wholesome for man's body, commonly called kipper salmons. It is therefore enacted by the King, our sovereign lord, the lords spiritual and temporal, and the commons in this present parliament assembled, and by the authority of the same, that, from the 1st February next coming unto the last day of July then next ensuing, and so yearly from thenceforth during the space of ten years, no manner of person or persons of what estate, degree, or condition so ever they be, with any manner of net, &c., shall take any fry of eels, &c., in any rivers or waters, salt or fresh, within this realm of England or Wales, or in the marches of the same; and over this that during the said ten years no manner of person or persons from 1st May 1535 to 1st September then next following, and so yearly from thenceforth during the said ten years, shall presume willingly to take or destroy in or by means of any wele, butte, nett, &c., or by any other engine in flood-gate, salmon-pipe, or at the tail of any mill or weir, or in any straits, rivers, rives, or brooks, salt or fresh, within the realm of England, Wales, Berwick, and the marches of the same, the young fry, spawn, or brood of any kind of salmon called 'lakspynkes, smowtes, or salmon-pele,' and that no manner of person or persons, of what degree or condition he shall be, from the Feast of the Exaltation of the Holy Cross (14 September) to the Feast of Saint Martin in winter (11 November) during the said ten years, shall willingly by any means aforesaid, or otherwise, kill or destroy any salmons not in season, called kipper salmons, within any fresh river or salt river, or in places where at that time such salmons have naturally their repair, within this realm of England, Wales, Berwick, or within the marches of the same." Then a penalty of 5*l.* for each offence is declared, and the forfeiture of nets and engines.

38. This was a very large extension of the close time enacted for a space of ten years, thereby restricting all the private owners of fisheries, in order that the breed

of fish might have time to recover,—again shewing how the legislature has treated the rights of private owners subordinate to the ruling public policy of keeping up the breed of fish.

39. 1 *Eliz. c.* 17. The next statute is 1 Eliz. c. 17 (1558), which was passed mainly for the preservation of the spawn and fry of fish. The previous statutes had dealt with weirs and fixed engines, and with close seasons; but the size of mesh had not been sufficiently defined, except by vague words. By the statute 13 Ric. 2, no nets and engines were to be used by which the fry or the breed of the salmons, lampreys, or any other fish may be destroyed. In 2 Hen. 6, c. 15, it was said the "nets shall be of assize." These expressions seem naturally to imply that there was some standard of mesh appointed by some well-known statute or old assize, of which, as well as of other old statutes, no copy can now be found. The statute 1 Eliz. c. 17 is an elaborate attempt, not only to define the size of mesh, but also the size of fish to be in future legally caught with nets of legal mesh. This statute actually prescribes the minimum size of marketable fish, including salmon, and subjects to heavy penalties those who offend against the statute by taking or killing fish under this minimum size. Some alterations as to the size of marketable fish were made by subsequent Acts, 33 Geo. 2, c. 27, s. 13, et seq.

40. This Act (1 Eliz. c. 17) does not throw any light on the question as to weirs in non-navigable rivers, but it expressly applies to rivers and streams, salt and fresh, and is another instance of restrictions put upon private owners in their own waters, so as to prevent them destroying the fish "to the great hinderance and decay of the commonwealth," thereby illustrating that the legislature recognised no such thing as a private right which interfered with the preservation of the breed of fish.

41. 3 *Jac.* 1. *c.* 12. The next Act of 3 Jac. 1, c. 12 (1605), is professedly passed for the better preservation of sea fish and their brood, and enacts that all who set up new weirs along the sea-shore shall be liable to penalties. This statute, however, seems not to touch the question now in hand, and may be passed over.

42. 4 & 5 *Anne, c.* 21. Though some of the series of fishery statutes are local, yet these are valuable as throwing light on the general statutes; and one of these is important as shewing that the legislature was fully possessed of so much of the natural history of the salmon as is absolutely necessary for the proper understanding of the mutual rights and relations of riparian owners and the public. In 1705, an Act, 4 & 5 Anne, c. 8, was passed for the increase and better preservation of salmon and other fish in the rivers within the counties of Southampton and Wilts. It recites that "Whereas the salmon and salmon-kind of fish resorting to spawn within the rivers and freshes in the county of Southampton and southern parts of Wiltshire, are in danger of utter decay, to the great loss of this kingdom, and the royalties and fisheries in the said counties are in great measure consumed and destroyed, by placing divers engines and other devices in and upon the main rivers, and in the new channels, dikes, and cuts which now are or shall be cut out of the same rivers, by means whereof the salmon stripes or kippers as well as the young fry or smelts, are taken and destroyed, and are prevented from returning to the sea in season: And whereas the owners and occupiers of the salmon fisheries within the said counties, regarding only their private and greedy profit, to destroy

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the stock of the said fisheries by preventing the breed of good fish to pass in season through their fishing-weirs and fishing hatchways from the sea into the said rivers to spawn, and by killing such as are undersize, and by fishing continually out of season at and in the said fishing-weirs and creeks of the rivers with nets and other devices, whereby not only the increase of the species of the said fish, but also the growth thereof, is in great measure destroyed: And whereas, notwithstanding the many good laws before this time made and still in force with intent to prohibit unlawful killing or otherwise destroying the game of this kingdom," &c., for remedy whereof be it enacted, &c. Then the previous statutes as to close season are recited and ordered to be strictly enforced; also justices are to see and inquire into offences, to punish those who use unlawful nets, &c.

Then it is enacted that, if salmon or salmon-kind shall go into any of the dikes, cuts, or water carriages, all owners and occupiers of meadow grounds in and upon the banks of any waters or rivers in the said counties shall permit the said fish to pass or go out of the said cuts or dikes or streams into the main rivers again.

It is also enacted in s. 5 that "all owners and occupiers of corn, fulling and paper and other mills upon any the waters or rivers in the said counties shall constantly keep open one scuttle or small hatch of a foot square in the waste-hatch or watercourse in the direct stream wherein no water-wheel standeth, sufficient for the salmon to pass and repass freely up and down the said rivers in the said counties from the 11th of November to the 31st of May in every year, during which season the old salmon and the young fry of the preceding year retire to the sea and the breeding salmon come from the sea to spawn, and shall not make use of any nets, pots, racks, hawks, gins, or other devices whatsoever to be placed in the said scuttle or small hatch of a foot square in the said waste-hatch, in or about the said mills respectively during the said term, to kill or destroy or take any salmon or salmon-kind, upon the like pains, penalties, forfeitures, and imprisonment as aforesaid." The penalty is then declared of 1*l.* to 5*l.* for the first offence, double that sum for a second offence, and, on default of payment, three months' imprisonment in the house of correction. The statute goes on:—"And, in case they shall lay any pots or nets to catch eels after the 1st of January to the 10th of March in every year, which they may do, they shall set racks before them to keep out of the said pots or nets the old salmon or kippers which during that season are out of kind and returning to the sea. And after the 10th of March to the 31st of May in every year they shall lay no pot, net, or engine but what shall be wide enough to let the fry of salmon pass through to the sea, or shall take or keep or offer to sale any of the young fry that during the seasons aforesaid are returning from the said rivers to the sea, upon the pains, penalties, forfeitures, and imprisonments as aforesaid."

By the 6th section a close season as to sea trouts is declared to be between the 30th of June and the 11th of November.

43. Now, no saving is made of existing mill-dams, some of which might have existed during all legal memory, and therefore might be lawful without a hatch, and no compensation for vested interests is given or alluded to, simply because this matter had always been treated as within the imperial police of the realm; and the enactment of an aperture of a foot square was probably fixed upon because the legislature thought that might suffice, and represented really all the interference

with these mill-dams that the public good required. It may be well to bring up the subsequent history of this aperture of a foot square in the Southampton rivers.

44. The statute 1 Geo. 1, st. 2, c. 18 (1714), ss. 11, 12, reciting the statute of 4 & 5 Anne, c. 21, alters the close season from the period of the 30th of June to the 11th of November into a period of the 1st of August to the 11th of November as to owners of fisheries; but the provision as to scuttles or hatches in mill-weirs was not repealed. The 37 Geo. 3, c. 95, however, recited that the last change had been found very prejudicial, and that further provision was necessary for the better preservation of the spawn, fry, or young brood of salmon, salmon-peal, and salmon kind, and substituted a new close season for the counties of Southampton and Wilts, of the 12th of September to the 1st of January. The 6th section then recited that whereas it was expedient to extend the time limited by the said Act of 4 & 5 Anne, c. 21, s. 5, for keeping open such *scuttle or hatch*, "be it enacted that all *owners and occupiers of mills* upon the said rivers shall constantly keep open the said scuttle or hatch in the manner directed by the said recited Act from the 11th of November to the 11th of July in every year, under the like pains, penalties, and forfeitures as are contained in the said recited Act." Therefore, the legislature increased the time for keeping constantly open this aperture, and not a word about any compensation for any injury to milling power is alluded to.

45. 1 *Geo.* 1, *st.* 2, *c.* 18. We now come to a most important statute in the series, which though long posterior to 12 Edw. 4, reflects light upon it, and may well serve to explain its object and scope. The statute of 1 Geo. 1, st. 2, c. 18 (1714), is an Act dealing with both sea fish and river fish, and inter alia is intituled "An Act for the better preservation of salmon within several rivers in that part of this kingdom called England." It prescribes the minimum length of the chief sea fish for marketable purposes, and subjects to penalties all who bring to shore or sell fish under the standard size. The 14th section then begins as follows: "And whereas the several Acts of parliament heretofore made for the preservation of fishing within the rivers of this realm have hitherto proved ineffectual in respect to the rivers Severn, Dee, Nye, Teame, Were, Tees, Ribble, Mersey, Dun, Air, Ouse, Swaile, Calder, Wharf, Eure, Darwent, and Trent, for want of a due encouragement to be given to such persons who could discover the many illegal practices and abuses done therein, and by reason of the dilatoriness and expensiveness of the suits and proceedings directed by the said Acts for punishing such abuses: Wherefore, for remedy thereof, and for the better securing the spawn, fry, and breed of salmon in the said rivers, be it further enacted by the authority aforesaid, that if any person or persons whatsoever shall at any time hereafter lay or draw any kind of nets, engines, or devices, or wilfully do or commit, or cause to be done or committed, any other act whatsoever in the said rivers or in any of them, whereby the spawn or small fry of salmon therein, or any kipper or shedder salmons or any salmon not being in length eighteen inches or more from the eye to the extent of the middle of the tail, shall be taken and killed or destroyed; or shall hereafter make, erect, or set any bank, dam, hedge, or stank, net or nets, cross the said rivers or any part thereof, whereby the salmon therein may be taken, or hindered from passing or going up the said rivers to spawn;" or shall fish in close season or with other nets than allowed by 1 Eliz. c. 17, and 30 Ch. 2, stat. 1, c. 9, &c.; "every person so offending in any of the said cases, who shall be convicted before justices of the peace, &c., shall forfeit 5*l.* for every such offence, besides

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the fish and nets, &c.; and the said justices shall also cause such banks, dams, hedges, or stanks, made or erected cross the said river to be demolished and removed, at the charges of such offender;" and, if the charges or penalty be not paid, the offender to be committed for three months to the house of correction.

46. Now, here is an enactment as to which there can be no possible reason for doubting that it applies to the non-navigable parts of the rivers. It clearly applies to all parts of these rivers which salmon frequent; navigation has obviously nothing to do with the statute. Another point is equally clear, that it applies to all dams thereafter to be made, and therefore includes mill-dams, which are as much within the mischief as any other dams; there is no saving or reservation of anything whatever, and it is so comprehensive as to strike at everything that hinders the fish from going up the river to spawn. Another noticeable thing is the preamble. It gives the true reason why it was that the old statutes were not effectual; it says it was because of the dilatoriness and expensiveness of the suits necessary, and the want of a due encouragement to those who could discover the many illegal practices and abuses. There is not a word about the former statutes not having extended to the non-navigable parts of rivers. Now, if the legislature in 1714 had thought there had been no previous enactment restricting weirs in non-navigable parts of rivers, would the legislature not at once have given that as the true reason of the new enactment? What better reason could have been given if it was the true reason? Would it not have recited thus: "Whereas the several Acts of parliament heretofore made for the preservation of fishing within the rivers of this realm were confined to navigable rivers only, but the breed of salmon cannot be effectually preserved unless the riparian owners in the upper and non-navigable parts of such rivers as far as the said fish go to spawn be also restricted," &c.-&c.? Now, is it consistent with the language of this enactment, that the legislature thought that there were no previous enactments applicable to the same area? There can scarcely be a doubt on that subject. This statute did not extend the statutes into new ground; all that it did was to enact a new and more stringent penalty, and, as was supposed, a more summary remedy, for what before the statute was equally an offence, but remediable only by dilatory and expensive means.

47. But an equally important point remains to be noticed as to this statute of 1 Geo. 1, st. 2, c. 18, s. 14, and that is, that it will be observed that the prohibition against dams, that is, including all mill-dams which shall be thereafter built, is general and ex facie absolute, and the justices are to cause the dam to be demolished and removed; as if implying that the whole dam was intended and authorized to be knocked down; and such was apparently the assumption on which the Court of Queen's Bench proceeded in the late case of *Garnett* v. *Backhouse* (Law. Rep. 3 Q. B. 30). Now, if this were the true construction, one might at first sight suppose that it would be a monstrous thing to prohibit mill-dams on the upper parts of these great and important rivers. But, in reality it is not an absolute, it is only a qualified prohibition; the illegality of the dam is only pro-tanto. A riparian owner might just as fully as before, notwithstanding that statute, set up a mill-dam. He would, of course, still have to make his peace with the immediate neighbours whose lands lie within the limited range of his milling easement, that is, whose lands will be flooded or suffer diversion of water. But as to the dam in other respects, all he would have to do under this enactment would

have been to take care that it did not hinder the passage of fish. No other mischief was to be guarded against. This he could only provide against by doing what the statute of 17 Ric. 2 already injoined, namely, by leaving a reasonable aperture in the dam. The onus would lie on him to discover what was a sufficient aperture for the purpose. Therefore, the justices would not in such a case be justified in demolishing the whole length of the dam; nor does the statute so require. It would be enough to demolish a small part, so as to make an aperture. Now, this was precisely what the commissioners would also have had to do under the statutes of 12 Edw. 4 and 17 Ric. 2. With regard to 12 Edw. 4, so far as the dam stood in navigable parts of rivers, it would no doubt require a very much larger aperture, so as to admit boats; but, even as to navigable waters, the prohibition of dams was only pro tanto. But, so far as that statute of 12 Edw. 4 applied to dams on non-navigable rivers, all that would be then illegal would be only a part equivalent to the size of a reasonable aperture; pro tanto only would the dam be illegal, but quoad ultra it would be legal, if the ordinary milling easement had been acquired. Therefore, this statute of 1 Geo. 1, st. 2, c. 18, is just as general in its language as that of 12 Edw. 4 was; and it is sufficiently clear that both would be required to be construed by the courts, not according to the ex facie absolute generality of the words used, but only pro tanto, so far as the mischief extended, and no further. If the mischief was impeding the passage of vessels and boats, then a wide aperture would be required; if the mischief was confined to impeding the passage of fish, then only a small and almost nominal aperture would be necessary. This construction of statutes which are wider in their language than the mischief requires, so as to cut down their generality to suppress the mischief and no more, is one of the common and peculiar functions of a court of law; for, the legislature is constantly passing Acts which require to be cut down to the precise standard which is required to suppress the mischief. And, if the statute of sewers be compared with the language of 12 Edw. 4, it will appear that there is no reason why one should apply to non-navigable rivers more than the other. The statute of sewers was extended to non-navigable rivers, not by express words, but by reasoning from the subject-matter; so the reason of the thing, namely, the safeguard of all the fry of fish spawned within the rivers, equally requires the statute of 12 Edw. 4 to extend as far as salmon extend. And it is a feature common to both statutes that weirs are not put down absolutely, but only so far as the mischief requires. Precisely the same reasoning mutatis mutandis is applicable to both. See Callis, 264, 265. And the American courts have taken the same view of similar statutes of their own; for, some of their statutes authorized mill-dams to be made, provided they did not impede navigation and the passage of fish. Under such a statute, when dams have been complained of as illegal and exorbitant and closing up all passage, the courts have held that the whole dam was not to be demolished, but only pro tanto, so as to make a sufficient aperture for the fish.

48. 45 *Geo.* 3, *c.* 33 (*local*). There were other local Acts extending the summary remedy as to weirs in non-navigable rivers. Thus the statute 45 Geo. 3, c. 33 (1805), intituled an Act for the preservation of salmon in the rivers of Carmarthenshire, after reciting the 13 Edw. 1 and 13 Ric. 2, and that it is necessary that provision should be made for the better preservation of salmon, and the spawn, fry, or young brood of salmon, salmon-peal, salmon kind, sewen bougies, or sea trout, in the said rivers or waters, and in the several rivulets or streams of water com-

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municating therewith, inter alia enacts, that no person shall at any time hereafter make, erect, or set any bank, dam, hedge or stank, net or nets, across the said rivers, waters, or rivulets, or any part thereof, whereby the salmon therein may be hindered from passing or going up to spawn, or the young fry or young salmon from going down the said rivers, rivulets, or other waters communicating therewith as aforesaid, &c., on pain of forfeiting for every such first offence 20*s.* to 10*l.*, and for every subsequent offence 40*s.* to 20*l.* This Act also clearly extended to all streams, however small, which salmon frequented.

49. 46 *Geo.* 3, *c.* 19 (*local*). Another local Act passed for Pembrokeshire. In 1806, an Act for the regulation of the oyster, sole, and salmon fisheries within the harbour of Milford, in the county of Pembroke, and the rivers running into the said harbour, after reciting the statutes 13 Edw. 1 and 13 Ric. 2, and enacting a close time, and reciting that better provision be made for salmon, and the spawn and fry, sea trout, &c., in the said harbour, and in the said rivers or waters, and in the several rivulets or streams of water communicating therewith, provides inter alia that, if any person shall hereafter make, erect, or set up any bank, dam, hedge or stank, net or nets, across the said harbour of Milford, or across any of the said rivers, waters, or rivulets, or any part thereof, whereby the salmon therein may be hindered from passing or going up to spawn, or the young fry or young salmon from going down the said harbour or the said rivers, rivulets, or other waters, &c., every person shall incur 20*l.* for every such offence. Here again the statute clearly extends to all streams which salmon frequent in that locality.

50. 58 *Geo.* 3, *c.* 43; 6 *&* 7 *Vict. c.* 33: 11 *&* 12 *Vict. c.* 52. The remaining statutes up to 1861 may be briefly alluded to. The statute 58 Geo. 3, c. 43 (1818), was intituled an Act for preventing the destruction of the breed of salmon and fish of the salmon kind in the rivers of England. It deals with close season, poisoning of fish, catching or scaring young fry; but it expressly states that nothing therein contained shall be deemed or construed to legalize or destroy any fishlocks, coops, bays (that is, dams), that may have been lawfully erected; or to extend or alter any local Act. Other Acts of 6 & 7 Vict. c. 33 (1843), and 11 & 12 Vict. c. 52, altered the close season and the penalties, but did not touch the question of weirs in non-navigable rivers. No other statute passed on the subject till the Salmon Fishery Act of 1861; but, before noticing that Act, it is necessary to complete the statement of the common and statute law preceding the passing of that Act.

51. *Rotuli Parliamentorum.* If there was any obscurity as to the meaning of the long series of statutes, many of which are of so great antiquity, it is legitimate to seek some assistance as to their meaning and object by examining the petitions in parliament, especially in the fourteenth and fifteenth centuries, embracing the period between Edw. 1 and Edw. 4. Now, the Rotuli Parliamentorum abound with petitions praying for relief against weirs and kiddels on rivers; and, though the great majority of them certainly, as might be expected, mention the injury to navigation as the prominent grievance, yet there are also many petitions founded on the waste and destruction of the fish, which do not mention navigation at all. Now, the practice in those early times, was for the Commons to petition the King in parliament on almost every subject of importance, praying for the redress of some grievance. The judges and great men of the realm assisted the King in drawing up the proper answer. If statutes had already provided a remedy for the

grievance, an answer was given to that effect. If no statute provided such remedy, and one seemed necessary, then the petition was, with some alteration, turned into a statute, and entered on the statute-roll for future guidance. The abstracts of these petitions form the Rotuli Parliamentorum, which is a repertory of valuable information as to our early legislation.

52. 1 *Edw.* 3 (2 *Rot. Parl.* 331). In 1 Edw. 3 (2 Rot. Parl. 331), 1326, there is a petition of the Commons complaining that salmons and other fish of the river Thames were very nearly destroyed by certain engines put in the river, which destroyed all the fry of fish, and that people gave the fry to swine to eat, and praying that trinks (i.e. fixed nets) be prohibited, also that salmon should not be taken during certain months, and that no nets should be allowed unless they were of large mesh; and the petitioners add this:—"May it please your highness to try this manner for three years next ensuing, so that all your people repairing to London or elsewhere near the said river (Thames) will be able to buy as good a salmon for 2*s.* as they can now do for 10*s.*" The answer to that petition is, "let the statutes be kept and observed, and let commissions issue to inquire, and duly punish the defaults found there."

This petition with the answer shews that the object of the statutes from the first really was to increase the supply of fish, though it has been lately stated that such an idea as the restraining of private owners in order to increase the supply of fish had never occurred to the legislature till 1861. It would rather seem to have been the main object kept in view for six centuries; and the attainment of that object occupied no less than two out of the thirty-seven chapters of Magna Charta.

53. 50 *Edw.* 3 (2 *Rot. Parl.* 332). In 50 Edw. 3 (1376), 2 Rot. Parl. 332, there is a petition of the Commons of Middlesex and others, that whereas they were wont to fish in times past in the river called Brent, in the county of Middlesex (which is a branch of the Thames), to the great public profit, and now lately several people who have land on the said river have made divers weirs for their individual profit, to the great destruction both of the said river and fishery as well as of the said river Thames, to the public loss; whereupon they pray it may be ordained in the present parliament that the said weirs be put down for the common good, and the said fishery used as it had been used in ancient times, and that no one should fish in the said river but with nets of assize, as they used to do, and praying relief. The answer is, "let the statutes made herein be firmly kept and put in execution."

Now, the river Brent is a tributary of the Thames, and only tidal for a short distance, and there is no grievance about navigation here; and this grievance shews how weirs on the tributary of a salmon river were then correctly understood to affect the public interests in the main river, and how the legislature and great men of that day considered that the statutes then existing met the evil. Those statutes were Magna Charta, 13 Edw. 1, 25 Edw. 3, and 45 Edw. 3; and this entry goes to shew that, though ex facie the two last statutes mention only injury to navigation as the reason of their passing, yet in reality protection to the fish was also the object; and hence this answer to the petition furnishes a contemporanea expositio of those statutes of Edw. 3.

54. 8 *Ric.* 2 (3 *Rot. Parl.* 201.) In 8 Ric. 2 (3 Rot. Parl. 201) 1384, a petition of the Commons says that, whereas there used to be in the river of Thames,

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Medway, and other great rivers in the realm, great plenty of fry of fish, that is to say, trouts, salmon, pikes, roaches, barbels, and other fish, which fry, if it were protected and cherished, would be of great profit to the lords and commons of the land; and now it is common for divers persons living near such rivers to take the fry with subtle nets, and sell them for sustenance of swine, &c.; and they pray that no one be allowed to use a net thenceforth which is not as large as by statute it was hitherto. And the answer is, "let the statutes hitherto made herein be kept and observed and put in due execution." Now, there is no statute now on record to that effect; the 13 Edw. 1 only prohibits young fry of salmon being taken at mill-pools, but says nothing as to the size of mesh generally. Hence, it is reasonable to conclude that there were statutes before that date, of which we have no copies.

55. 14 *Ric.* 2 (3 *Rot. Parl.* 282). In 14 Ric. 2 (3 Rot. Parl. 282), 1390, there is a petition of the Commons reciting the statute 25 Edw. 3, and stating that it was passed also against the destruction of fish in the same river (though that statute ex facie says nothing about fish). Then the 45 Edw. 3 is recited; and then the petitioners say, "by virtue of which statutes, at the time they were executed, there were sold in London a salmon of the Thames for 16*d.*, 17*d.*, or 20*d.*, and the best for 2*s.*, and a fresh lamprey for 6*d.* or 7*d.* But now, notwithstanding the said statutes, the said gorces, trinks, and kidels are set up, as well causing disturbance to ships and boats as a destruction of the fish of the said waters, so that they take the fry of salmons and other fishes in so great a multitude that they give them to their swine to eat." Then the petitioners pray that the gorces, trinks, and kidels be utterly put down. The answer is, "A sufficient remedy has been provided by the statutes already, which statutes the King wishes to be kept and put in speedy and due execution." This entry, therefore, shews that the statutes of Edw. 3 were not understood to be passed merely for the protection of navigation, though courts of law may now be inclined to put that narrow construction on them.

56. *Liber Albus.* In the Liber Albus there are several charters and ordinances of the Kings of England relating to the Thames, which also assist in the contemporary exposition of the early statutes as to kidels. In a charter of 8 Ric. 1, p. 428, it is said that the King, for the salvation of his soul, and those of his father and of his ancestors, as also for the common advantage of his city of London, and of all his realm, did grant and strictly enact that all kidels that were in Thames should be removed, wheresoever in Thames they might be, and that for the future no kidels should be placed anywhere in Thames. Now, why should this be read as "anywhere in the navigable waters of the Thames?" It can scarcely have been so understood in early times. This also shews that, before the great Charter of John, there must have been statutes of a sweeping character against these kidels or fixed engines; and that vast importance was then attached to the subject, may be inferred from the number of imprecations used. Then another charter of 1 John, p. 428, repeats the same language as to both Thames and Medway, and adds a penalty of 10*l.* sterling, "owing to the great detriment and disadvantage that did accrue unto the said city, as also unto the whole realm, by reason of the kidels aforesaid." A chapter in Liber de Antiquis Legibus, quoted, p. 431, also states that in 1253, 37 Hen. 3, the sheriff of Middlesex, by precept of the King, caused to be destroyed all the weirs that stood throughout

the whole of Thames towards the west; and that would extend up the river at least to Staines, the boundary of the sheriffdom.

57. *Cumberland Placita*, 6 & 7 *Edw.* 1. At this point it may also be well to refer to several ancient documents of which office-copies were tendered on the hearing of the present case. Thus, there was a duly certified extract from the Public Record Office intituled "Placita de quo Warranto et de juratis et assisis, Cumberland, 6 & 7 Edw. 1." It contains a statute concerning fishery, which is a local Act for the county of Cumberland. It begins thus: "The jurors of Lyth and Eske, and the jurors of Cumberland and Allerdale, have presented that a great destruction has come to pass in the waters of Eden and Esk, and in other waters in that county, of salmons at the time when the salmons go up to spawn, and likewise of the young salmon at the time when they go down to the sea, to the great detriment of the whole county and of all the counties adjacent; and they have sued, on the part of the whole county, that there may be a statute and provision made by which the aforesaid destruction may not happen hereafter; and therefore by consent of the whole county, as well of knights as freemen of that county, no one gainsaying, it is ordered and provided," &c. The Act then specifies two periods during which fishing was absolutely prohibited, and another period when no net or engine should be set at the weirs except by keepers deputed; and these were to be so large that the small salmon should have passage through the midst, that is to say, that it be of four thumbs' length. The punishment is imprisonment. Thomas de Molton, of Gillesland, is appointed to take amends for unlawful nets. Certain baskets called borachs, put at mills, are absolutely prohibited. Then it is said, "the whole county complaineth that the prior of St. Bega hath two engines which are called coops, for taking salmons in the pool of Stainburn, to the detriment of the whole county, where in times gone by he used to have but one only, and another was set up six years since elapsed without warrant and after the last circuit of the judges; therefore he is amerced. And it is injoined that the other coop be laid aside at the view of the jurors, at the costs of the said prior. It is ordained, moreover, and firmly injoined, that, in whatsoever pool or weir of the waters of Eden, Esk, and Derwent, and in the other waters where salmon can be taken, in the thread of the said waters of ancient custom there ought to be a hole so large that a sow with her five little pigs can enter. And now they are beyond measure straitened, that is to say, at Cockmue, Camberton, Staynburn, and Wyrkington, that for the future holes of this sort be enlarged at the sight of the jurors, at the costs of those who have straitened them." Then certain persons are named conservators of the rivers.

58. Now, this statute recognises it as common law or ancient custom at that time, that there should be an aperture or fishway in the centre of all weirs or pools. It passed soon after Magna Charta, and before the first of the close season statutes. It also throws light on the meaning of Magna Charta, and shews that no distinction, so far as salmon were concerned, was recognised between navigable and non-navigable rivers, for the places mentioned are all in non-navigable rivers, and one of them nine miles above the flow of the tide. And it further shews that the practice was to appoint conservators, who took charge of a whole river, and burnt the unlawful nets and enlarged the apertures in the weirs by virtue of their office.

59. *Judgment Roll*, 45 *Edw.* 3. Another ancient document relating to the

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Derwent, being a judgment-roll of 45 Edw. 3, relates that an action was brought by the Earl of Angus and his wife for injury to their part of the river in their manor of Cockermouth by John of Camerton's weir. The declaration alleged that, from the time whereof memory is not, they had had a certain aperture of the breadth of twenty-four feet, commonly called the Free-water, which aperture ought always to be in the deeper part of the water aforesaid, and in all mill-pools and demesnes from that weir to the sea. The cause of action was, that John filled up the aperture with stones, to divert the water to his mill, whereby they only took four salmon now for forty that they took before. The judgment was, that eight feet of the said handiwork of stones was a nuisance, and was ordered to be abated at John's expense.

60. *Inquisition,* 17 *Ric.* 2. Another document was a commission issued by the Crown in 17 Ric. 2 to certain persons to inquire what franchises belonged to the honour of Cockermouth; and an inquisition was held thereupon, and the return stated that the lord of the honour of Cockermouth, amongst other things, had the searching and amending of the water of Derwent and free water from the sea as far as to the head of the same waters, as well in mill-ponds as in other places whatsoever, in the waters aforesaid, and to put the waters in defence time, and to punish trespassers by the burning of nets and other engines, and imprisonments and other punishments, as the lord the King and his officers do elsewhere, fines and amercements and other profits whatsoever to be taken thereupon to their own use.

Now, this is a strong contemporaneous exposition of what was meant by the statute of 17 Ric. 2, which authorized justices of the peace to be conservators and to exercise like authority in rivers. It shews that there was no restriction of the power of amending weirs to navigable waters. On the contrary, it is from the sea to the head of the waters that this police extends.

61. *Eliz. survey* (1577). In another document, being an Elizabethan survey on the death of the Earl of Northumberland, dated 1577, referred to at the hearing of this case, a memorandum relating to the honour of Cockermouth stated that, in the time of Henry, late Earl of Northumberland, uncle to the Earl that now is, and before that time ever since until about twenty-four years ago last past, the river of Derwent was a free water, and kept open in all places, without coop, fishgarth, or any other let, from the sea or foot of the said river unto an old coop or fishgarth now decayed which stood about Cockermouth Castle. And diligent search was made from time to time by the said Earl, his farmers, whether the said river were kept open as aforesaid or not; and, if any default were made and found in stricting or stopping thereof, the same was pulled down and laid open as before. The which said river is now stopped and shut up with a fishgarth made of late years by Sir Henry Curwen, knight, to the prejudice of the said Earl, his inheritance, and to the great damage and loss of his lordship's tenants and farmers, as well in the said town of Cockermouth as also in Darwent Fells, the Five Towns, and elsewhere within the precincts and limits of the said honour.

62. *Old authorities in English law.* Such being the statutes and the ancient documents which give a legislative exposition to those statutes, it may be well to notice other authorities in the law. In the Capitula Itineris, or Articles of the Eyre (1 Stat. Realm, 234 a), two of the pleas of the Crown were stated thus: "Of those who have set up a warren on their lands without warrant of our lord the

King; of those who fish with kidels and weirs." See also Fleta. Nothing is said about navigable rivers. Bracton, who wrote in the time of Henry 3 clearly lays down that a grant of an easement will only be implied from long possession that is open, peaceable, and uninterrupted, which implies knowledge and ability to interrupt,—"longus usus, nec per vim nec clam, nec precario," Bract. 222 b. And, in another passage (B. 4, tit. 44) (which Fleta, B. 4, ch. 27, tit. 7, repeats), Bracton gives as an illustration of the law the case of a weir being set up in a river where the owner had both banks, and, though the injury done to the neighbouring tenements may be damnum absque injuria, and as against mere private interests could not be interfered with, yet on account of the injury done to the public it shall be abated or suppressed; which would seem to imply (for he does not hint at navigation) that, in non-navigable rivers, it was well understood at that time that a weir must prejudice the public, as destroying the breed of migratory fish.

In Vin. Abr. Nuisance, E. 3, it is said assize of nuisance lies for raising of a gorce or weir to intercept the course of fish coming from the sea usque ad gurgitem meam superiorem. See also Fitz. N. B. 184 A; 46 Ass. 9. In Vin. Abr. (Nuisance, A. a.) it is said that in nuisance for enhancing of a pool, the enhancement only was to be abated, and no more.

Hale (de Jure Maris), as already stated, agreeing with Coke, says in several places that the statutes of 13 Edw. 1 and 13 Ric. 2 and 17 Ric. 2 apply to every river wherein salmon are, though not to rivers which are not salmon rivers. And Hale clearly states that all rivers, fresh as well as salt, are subject to the servitude of the public interest, as regards the laws for conservation of the fish, thereby implying that that matter is without the pale of private ownership altogether. Thus, Hale says (de Jure Maris, c. 1): "Though fresh rivers are in point of propriety as before primâ facie of a private interest, yet, as well fresh rivers as salt, or such as flow and reflow, may be under these two servitudes, or affected with them, namely, one of prerogative belonging to the King, and another of public interest or belonging to the people in general." Again (in ch. 2) Hale says: "The Crown, by an ancient right of prerogative, had a certain interest in many fresh rivers, even where the sea does not flow or reflow, as well as in salt or arms of the sea;" and he says: "The Crown had an interest of jurisdiction in reference to common nuisances in or by rivers, as, where the sewers were not kept, which gave rise to the commission of sewers, as well for fresh rivers as for salt. Vide St. 23 Hen. 8, c. 5." Now, we know from Callis also, that the statute of sewers was held, on reasoning which is equally applicable to the conservation of fish, to apply to all streams whatever. Then Hale, in ch. 5, after noticing the 23rd chapter of Magna Charta and some of the statutes as to weirs, says: "But yet this that I have said must be taken with this alloy, which I have in part premised: 1. That this interest or right in the subject must be so used as it may not occasion a common annoyance to passage of ships or boats, for that is prohibited by the common law and these several statutes before mentioned, namely, erecting new weirs, enhancing old, fixing of pikes or stakes, and the like, in order to fishing, for the jus privatum that is acquired to the subject, either by patent or prescription, must not prejudice the jus publicum wherewith public rivers or arms of the sea are affected for public use: 2. That the fishing that a subject hath in this or any other private or public river or creek, fresh or salt, is subject to the laws for the

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conservation of fish and fry, which are many. And this gives me occasion to divert to the examination of those commissions that have been granted on common rivers, commonly called commissions of conservancy or water-bailiffs."

Then he alludes to the statute of 1 Eliz. c. 17, and the statutes of 13 Edw. 1, 13 Ric. 2, 17 Ric. 2, clearly stating that the latter statutes applied to all rivers "wherein salmon be."

Therefore Hale's authority confirms the view that the right of the subject to close up a river by a weir without an aperture was never recognised, but it was subject to the police of the realm.

63. *Weld* v. *Hornby*. Now, the chief case on the subject of weirs in non-navigable rivers is *Weld* v. *Hornby* (7 East, 195, 3 Smith, 244), where a riparian owner, situated above, sued the owner of a fishing mill-dam situated below, for obstructing the passage of fish. Though neither of the reports expressly states the fact, we know the locality, and that the site of that weir is above the tidal flow, and is in non-navigable water. In that case it was not necessary for the Court to say whether the weir was a public nuisance or not. Yet Lord Ellenborough, referring to the statute 1 Geo. 1, c. 18, and Magna Charta, and 12 Edw. 4, said this: "And I believe there does not exist in Great Britain a single undisputed weir, in any river, built entirely across the river. In a case which I happen to know, and which occurred with respect to a river between England and Scotland, it was not permitted to be contended for until there was some compromise by which the parties were satisfied. I happen also to know from my attendance in another place that the laws of Scotland, which are pretty full upon this subject, correspond nearly with the article in Magna Charta. At the Eden, where the corporation of Carlisle and Lord Lonsdale have stells for the catching of fish, it was held that the keeping of them close day and night was a public nuisance; and Lord Kenyon said no man can claim an estate in a public nuisance. When Buller, J., came to try that cause, he admitted evidence of usage, however, thinking that under certain restrictions these stells might be allowed by usage." Now, though Lord Ellenborough's view of the status of a weir in a non-navigable river is only a dictum, it is valuable because we happen to know from other cases, and from briefs and opinions in those cases which we have seen and read, that he had in the course of his practice at the bar been several times engaged in some of the most noted of this class of cases; and apparently they have been of rare occurrence in anyone's professional life. The stell fishery case at Carlisle, one of the memorable cases of the time, was apparently a standard illustration with Lord Ellenborough; and he alludes to it on another occasion. In *Rex* v. *Cross* (3 Camp. 224), an indictment was tried against a stage-coach proprietor, who had an office near Charing Cross, and kept his coaches standing in the street too long, soliciting passengers, and taking in parcels. It was urged that the practice had prevailed there ever since the building of Westminster Bridge. But Lord Ellenborough said this: "Every unauthorized obstruction of a highway, to the annoyance of the King's subjects, is an indictable offence. Upon the evidence given I think the defendant ought clearly to be found guilty. The King's highway is not to be used as a stable-yard. It is immaterial how long the practice may have prevailed; for no length of time will legitimate a nuisance. The stell fishery across the river at Carlisle had been established for a vast number of years; but Mr. Justice Buller held that it continued unlawful, and gave judgment that it should be abated."

64. Now, we have seen counsel's brief for the losing party in this stell case referred to, but which case is not reported. We also know the locus in quo. It was an action by an upper riparian owner against the corporation of Carlisle for keeping a stell net, that is, a net fastened to stakes across the whole bed of the river, which at the place was non-navigable, though an attempt was made at the trial to prove it was navigable; for, on one occasion, an adventurous man took a small vessel over the weir in a flood. The stells obstructed the fish passing up the river to the plaintiff's lands. The corporation proved that they had a grant of the fishery in that part of the river from the Crown in the time of Edward 3, that it had been used in the same way as far back as the then living memory could go; and the corporation books were produced shewing the rental paid for the specific fishery for 200 years back. Buller, J., first tried the case, and seems to have held it a nuisance, and would not allow any evidence of ancient right. But, on a motion for a new trial, Lord Mansfield said: "I shall lean excessively to support a possession of 400 years;" and a new trial was granted. Heath, J., tried the case on the second occasion; and it is true there seemed to have been an attempt to prove some show of navigation at the spot. But the judge's direction was: "No acquiescence in a nuisance will create a right; it stands upon public right; nothing can be presumed in favour of a nuisance, because the public are interested." The jury seem to have found for the plaintiff, and the stells have long disappeared. It does not appear that the statutes of Richard 2 were cited in that case, though the statutes of Henry 4 and Henry 6 were.

65. *American Law.* The law of America has been well developed on the subject of fishing-weirs. Chancellor Kent (3 Kent Com. 411) says: "The right of fishery in rivers not navigable is also subject to the qualification of not being so used as to injure the private rights of others; and it does not extend to impede the passage of fish up the river, by means of dams or other obstructions. The impediment was at common law a nuisance; and in Massachusetts it subjects the party creating it to a penalty given by statute." And the authority for this last statement is *Weld* v. *Hornby* (7 East, 195), which contains the dictum of Lord Ellenborough already referred to. That case seems to have been again and again adopted by the American courts without question, though it was only a dictum, as it agreed with the principles of the common law, apart from any statute. Chancellor Kent in another passage says (3 Kent Com. 418): "In rivers and streams not navigable as tide-waters, the owners of the soil over which they flow have at common law, and which common law has been generally recognised in the United States, the exclusive right of fishing each on his own side; and such right is held subject to the public use of the water as a highway, and to the free passage of fish, and in subordination to the regulations to be prescribed by the legislature for the general good." In the state of Massachusetts, a statute in 1789 enacted that a fish passage should be made in all weirs. In 1633 a grant of the right to erect a mill-weir in a non-navigable river had been made and enjoyed; and it was held that the statute applied. Parsons, C.J., said: "Every owner of a water-mill or dam holds it on the condition, or perhaps under the limitation, that a sufficient and reasonable passage-way shall be allowed for the fish. This limitation, being for the benefit of the public, is not extinguished by any inattention or neglect in compelling the owner to comply with it; for, no laches can be imputed to the Government, and against it no time runs so as to bar its rights:"

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Stoughton v. *Baker* (4 Mass. 522; *Shaw* v. *Crawford* (10 Joh. 236); *Commonwealth* v. *Ruggles* (10 Mass. 391); *Commonwealth* v. *Chaplin* (5 Pick. 199). In a later case, the owner of a dam in a non-navigable river, which obstructed the passage of fish, was indicted for nuisance. But the dam had been made, before the statute passed, under a patent which was held by the Court to have conferred the absolute right to erect the dam as high as the patentee pleased without any restriction; and on that ground, though otherwise recognising *Stoughton* v. *Baker*, the Court held that the owner of this dam was not affected by the statute, or, if he was, then that the statute was void: *The People* v. *Platt* (17 Joh. 195 (1819)).

In many of the states of America, mills, being expressly authorized and encouraged by statute, are on a higher footing than in this country, where they grow up at common law by consent of the owners of the land immediately affected by the milling easement. Yet, the American courts have held that, unless the milling privilege was granted absolutely before any statutory restriction was declared, the weirs are subject to the general regulations from time to time made by the legislature; and prescription is not allowed to encroach on the public interest, or to be set up against the right of eminent domain: *Commonwealth* v. *Upton* (6 Gray, 473); *People* v. *Cunningham* (1 Denio, 524); *Mills* v. *Hall* (9 Wendell, 315); *Hyde* v. *Russell* (2 Cush. 251); *Commonwealth* v. *Alger* (7 Cush. 53).

66. *If weir is an easement.* But let us assume now that all the statutes relating to weirs which destroy the breed of salmon are mere works of the imagination, not meant to be enforced, and which any person could violate with impunity, then arises the question what is the status or legal denomination of such a right as that of maintaining a fishing-weir in a non-navigable river? Is it within the category of easements, and, if so, is it within the Prescription Act?

67. *What is an easement.* What is an easement? It is a right to do something either on one's own land or on a neighbour's land, the immediate effect of which is to restrict or burden the neighbour's ownership of his land. It is a right over and above the ownership of land in the dominant owner, and a right subtracted from the ownership of the land in the servient owner. Thus, if the owner of close A. has a right of way over close B., this right is held as additional to the ordinary rights of ownership in close A., and correlatively it is so much subtracted from the ownership of close B. What it amounts to is this, that A. would have a right of action against B. for obstructing A. while using the way or for ploughing up or otherwise using his land so as to interfere with A.'s right of way on such land. The question whether the right to maintain a fishing-weir across a non-navigable river is an easement burdening all the other riparian ownerships will not be solved by assuming without examination that it is an easement, but by considering whether it has the characteristics of an easement. We must proceed analytically by first comparing their respective qualities and effects, before we can decide to what category of the law this right belongs.

68. *Easements created by grant.* The first characteristic of an easement is that it is solely and exclusively created by grant. Before the dominant owner of close A. can acquire such a right over close B. he must have obtained a grant of the same from the owner of close B., who alone has power to give away what must, according to the common law, have been once part of his ownership. It is often said that an easement may be created either by grant or by prescription, the

latter consisting in long user and enjoyment; but in reality there is only one mode of its creation, namely, by grant, for prescription is merely the evidence of, or a mode of proving the grant. Inasmuch as these rights are seldom created by an express grant, the law allows an easy mode of proving or implying some grant now lost, the grant being implied from a certain kind of user. But it has always been the law, and is now the law, that, if the right is not capable of being the subject of a grant, or has been used in such a manner that a grant could not be reasonably implied, then it cannot be proved by prescription.

69. *Prescription Act.* Moreover, the Prescription Act does not change the previous law even as to those easements included within it with regard to the following particulars:—

An easement is a definite and known restriction on the servient owner, the effects of which restriction are patent and obvious to such servient owner, and involve such a claim as a servient owner or his predecessor was capable of granting, and such as it is reasonable in the particular circumstances and from long subsisting relations between the properties to presume; and a right which the servient owner must be taken to have known to exist and be claimed, and which such owner had the ready means of interrupting by some reasonable and inexpensive means, as well as by action.

70. Before the Prescription Act, 2 & 3 Wm. 4, c. 71, the rule was, that an easement, if legally acquired, otherwise than by express grant, was presumed to have existed before the time of legal memory, i.e. before 1 Ric. 1, 1189; and hence, if the servient owner could prove that the alleged easement had been first used or was non-existent in any part of that long time, the claim to such easement was effectually defeated. That law still exists, except as to those easements which are included in the Prescription Act; and many easements are not so included. The Prescription Act deals only with a select class of such easements, or quasi easements. Thus, easements in gross are not within the Prescription Act, which only deals with easements as between the owner of a dominant tenement and the owner of a servient tenement: *Shuttleworth* v. *Le Fleming* (19 C. B. (N. S.) 687; 34 L. J. (C.P.) 309).

So it has been settled that negative easements are not within the Prescription Act, which only deals with easements which are used in and upon the servient tenement, and are capable of interruption by the owner of the servient tenement: *Webb* v. *Bird* (10 C. B. (N. S.) 268; 13 C. B. (N. S.) 841; 31 L. J. (C.P.) 335); *Murgatroyd* v. *Robinson* (7 E. & B. 391).

And lastly, prescription, either before or since the Prescription Act, cannot apply to a right which has been expressly prohibited by statute, unless the grant be presumed to have been made before such statute was passed. Nor can such right be claimed against the public, if it directly operate as a nuisance to a public right or franchise.

Now, a weir crossing the non-navigable part of the river, and stopping the fish from going up to spawn, operates just as fatally and directly in obstructing the public franchise of fishing in the estuary as if the structure were erected in the estuary itself. And one question will be whether it makes any difference that the weir, instead of being erected within the area where fishermen exercise their calling, is erected a little out of this area, but sufficiently near to operate as an obstruction.

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71. *Easement implies servient tenement.* Now, the first characteristic of an easement, unless it is an easement in gross, which we need not stop to notice, is that there must be a dominant and a servient tenement. The tenement on which the weir is erected must in that view be the dominant tenement, and each and all of the lands above as far as salmon go, and below the weir as far as the tidal limit, must be servient tenements respectively. This must follow as a necessary consequence. But then there is the public who fish in the estuary, and whose public franchise is just as much obstructed in their part of the river as the right of each riparian owner to catch fish within the area of his own land is in his part of the river. Yet no one can contend that the estuary is a servient tenement, or that any grant can be presumed from the public. Nothing that has taken place since legal memory, or at least since the statute of 12 Edw. 4, if that statute applies, can possibly be held legally to have authorized any encroachment on this public right of fishery; for, the public right to fish is quite as old and inalienable a franchise as that of navigation, or of passage along a way which has been once created a highway.

72. *Easement implies contiguity.* Another usual characteristic of an easement is the vicinity of the dominant and the servient tenements. Here again a remarkable anomaly exists, if a fishing-weir is to be deemed an easement. The servient tenement may be a hundred miles from the dominant tenement, for each riparian owner at the highest point of the river frequented by salmon must be in the relation of a servient owner to the owner of the weir. Now, the vicinity or contiguity of the tenements is generally the main ingredient for furnishing the means of inferring a grant. The theory of easements, where no express grant exists, is, that the alleged dominant owner has constantly, in the face of or before the eyes of the servient owner, been using on his own property, or exercising as of right on the servient owner's property, something injurious to or incompatible with the entire ownership of the servient tenement, which he (the dominant owner) would not be entitled to do unless he had the assent of the servient owner; and it is on the strength of this open, visible, known exercise of a possible inconsistent right that the inference of a grant is made; it being inferred that otherwise the conduct of the parties would be incomprehensible. But the effects of this non-contiguity come also under another head, namely, means of knowledge, which will be noticed hereafter. (See post, § 81.)

73. *Easement a definite restriction.* Another characteristic of an easement is that it is a definite and known restriction on the servient owner, such as is patent and obvious. This, in other words, implies that the servient owner knows, or has the ready means of knowing, precisely how his land is injuriously affected by the alleged easement. This is true of all easements known to the law, both affirmative and negative. In the case of an easement of way, the servient owner, being reasonably presumed to know what goes on upon the surface of his own land (though even that may be an element of difficulty), sees day by day the dominant owner walking or driving over it. A right of way is a definite known injury to the servient tenement, the length and breadth of which the servient owner can see and estimate without trouble. So, in the common milling easement of flooding a neighbour's lands, or diverting the water from his lands, both are known, visible, and definite injuries. So again, as to the negative easement of window-light. The dominant owner's house is built close to the boundary of the servient

owner's land, and the latter can see standing before him day by day the length and breadth of the ultimate injury this neighbour's house will do to his own land if the neighbour's light is allowed to ripen into an easement. So, as to all other easements, they are definite, visible, and easily-known burdens or restrictions on the ownership. Now, many rights have been lately rejected from the category of easements simply and solely because it was impossible to define the precise way in which the alleged easement affected the servient tenement.

74. *Chasemore* v. *Richards.* The most notable instance of this was in *Chasemore* v. *Richards* (7 H. L. 349), where a miller brought an action against a neighbouring owner for digging in his (the owner's) own land, and intercepting the underground water that percolated through the strata of such land into the river, and so swelled its volume and kept the mill going. The mill was an ancient mill, and may have existed centuries, and had acquired what is called the ordinary milling easement. The miller complained that he had a good title to this mill against all the world, and had an easement over all the lands through which the water percolated into the river. There was no doubt that the relation of cause and effect existed between the digging of wells and the reduction of the volume of water which from time immemorial he had used for his mill. Yet the courts decided that he had no such easement against owners of riparian lands, because it was impossible for owners to tell from looking at the surface of their lands whether water percolated underneath them or not, and so that it was too uncertain and indefinite a thing to operate as any restriction on the natural right of a freeholder to dig in his own lands as deep as he pleased. That case went through all the courts to the House of Lords, and is one of the leading authorities on the law of running as well as of underground water. And it shews that, let a mill be as ancient as legal memory, still, before the miller can carry his easement beyond the common milling easement, he must prove that the owner whose right of ownership he seeks to restrain was aware of some definite and easily ascertainable effect on his own land which resulted from the use of the mill.

In that case of *Chasemore* v. *Richards* (7 H. L. 370), Wightman, J., said: "Any such right against another, founded upon length of enjoyment, is supposed to have originated in some grant which is presumed from the owner of what is called the servient tenement; but, what grant can be presumed in the case of percolating waters, depending upon the quantity of rain falling, or the natural moisture of the soil, and in the absence of any visible means of knowing to what extent, if at all, the enjoyment of the plaintiff's mill would be affected by any water percolating in and out of the defendant's or any other land? The presumption of a grant only arises where the person against whom it is to be raised might have prevented the exercise of the subject of the presumed grant; but, how could he prevent or stop the percolation of water?" In the same case Lord Wensleydale said (p. 385): "As to that part of Mr. Justice Coleridge's opinion in which he relies on the possession of the mill for thirty or sixty years, I think he is wrong. I do not think that the principle on which prescription rests can be applied; it has not been with the permission of the proprietor of the land that the streams have flowed into the river for twenty years or upwards: Qui non prohibet quod prohibere potest, assentire videtur. But, how here could he prevent it? He could not bring an action against the adjoining proprietor: he could not be bound to dig a deep trench in his own land to cut off the supplies of water, in order to indicate his dissent.

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It is going very far to say that a man must be at the expense of putting up a screen to window lights to prevent a title being gained by twenty years' enjoyment of light passing through a window. But this case would go very far beyond that. I think that the enjoyment of the right to these natural streams cannot be supported by any length of user, if it does not belong of natural right to the plaintiff."

75. *Easement implies easy mode of interruption.* Another characteristic of an easement is, that the servient owner has some ready and easy or inexpensive means of guarding himself against the burden sought to be imposed on him by the dominant owner. In *Webb* v. *Bird* (10 C. B. (N. S.) 283; 13 C. B. (N. S.) 841; 31 L. J. (C.P.) 335) Erle, C.J., says: "I am clearly of opinion that the Prescription Act, 2 & 3 Wm. 4, c. 71, s. 2, was meant to include only such easements upon or over the surface of the servient tenement as are susceptible of interruption by the owner of such servient tenement, so as to prevent the enjoyment on the part of the owner of the dominant tenement from ripening into a right." And in the same case Willes, J., said: "In general, a man cannot establish a right by lapse of time and acquiescence against his neighbour, unless he shews that the party against whom the right is acquired might have brought an action or done some act to put a stop to the claim without an unreasonable waste of labour and expense."

Now, *Webb* v. *Bird* was the case of a man who was owner of a windmill. The owners of the lands near it began to build high houses, and these houses took the wind out of the sails of the mill, and he relied upon the easement which he said he had acquired, inasmuch as he had uninterruptedly used this mill twenty years and upwards. Erle, C.J., says, and his words and illustrations are important as closely analogous to the present case of a fishing-weir: "Is this a claim to an easement to be enjoyed or derived upon, over, or from any land, within the meaning of the 2nd section of the Prescription Act, 2 & 3 Wm. 4, c. 71? It appears to me that this section was not intended to give a right after twenty years to every sort of enjoyment which may be classed under the general term easement; but that it was meant to apply only to the two descriptions of easement therein specified, namely, the right to a way or watercourse which may be enjoyed or derived upon, over, or from any land or water. I do not think the passage of air over the land of another was or could have been contemplated by the legislature when framing that section. They evidently intended it to apply only to the exercise of such rights upon or over the surface of the servient tenement as might be interrupted by the owner if the right were disputed. It is clear to my mind that that was the intention of the legislature, because the section provides that the claim shall not be defeated where there has been actual enjoyment for the period mentioned 'without interruption.' I am at a loss to conceive what would be an interruption of such a right as is here claimed. In the case of a way, the exercise or enjoyment of the right may be interrupted by the erection of a gate or other impediment. So of the analogous right to water. So, a claim to lights may be obstructed or interrupted by the erection of a hoarding or other screen by the owner of the servient tenement. But I am utterly unable to see how the access of currents of wind and air to a mill, which is necessarily so constructed as to present its face to whatever quarter the wind may blow from, could possibly be interrupted. Suppose the same individual to be the owner of all the land round the mill beyond a radius of twenty or twenty-five yards, must he, in order to prevent the acquisition of a right by the owner of the mill, build a wall all round it? Here

there is neither grant nor prescription to sustain the claim; nor does it, as I conceive, come within the statute. A grant of such an easement as this would operate as a prohibition, to a most formidable extent, to the owners of the adjoining lands, especially in the neighbourhood of a growing town."

And in the same case Willes, J., said: "If any right here exists, it must be founded upon Lord Tenterden's Act; and, for the reasons given by my lord (Erle, C.J.), I think that statute is inapplicable. Light stands upon peculiar grounds. That which is claimed here amounts to neither more nor less than this, that a person having a piece of ground and building a windmill upon it, acquires by twenty years' enjoyment a right to prevent the proprietors of all the surrounding land from building upon it, if by so doing the free access of the wind from any quarter should be impeded or obstructed. It is impossible to see how the adjoining owners could prevent the acquisition of such a right except by combining together to build a circular wall round the mill within twenty years. It would be absurd to hold that men's rights are to be made dependent on anything so inconvenient and impracticable." And Wightman, J., in the Court of Error (13 C. B. (N. S.) 842), adds: "In the present case it would be practically so difficult, even if not absolutely impossible, to interfere with or prevent the exercise of the right claimed, subject as it must be to so much variation and uncertainty, that we think it clear that no presumption of a grant or easement in the nature of a grant can be raised from the non-interruption of the exercise of what is called a right by the person against whom it is claimed as a non-interruption by one who might prevent or interrupt it."

76. To the same effect is the decision in *Arkwright* v. *Gell* (5 M. & W. 203), where Lord Abinger, C.B., said (p. 232), in reference to a claim of servitude over a certain mine: "How can it be supposed that the mine-owners could have meant to burthen themselves with such a servitude so destructive to their interests, and what is there to raise an inference of such an intention? The mine-owner (i.e. the alleged servient owner) could not bring any action against the person using the stream of water, so that the omission to bring an action could afford no argument in favour of the presumption of a grant; nor could he prevent the enjoyment of that stream of water by any act of his, except by at once making a sough at a lower level, and thus taking away the water entirely; a course so expensive and inconvenient that it would be very unreasonable, and a very improper extension of the principle applied to the case of lights, to infer from the abstinence from such an act an intention to grant the use of the water in perpetuity as a matter of right. . . . The whole purview of the Prescription Act, 2 & 3 Wm. 4, c. 71, shews that it applies only to such rights as would before the Act have been acquired by the presumption of a grant, from long user. The Act expressly requires enjoyment for different periods without interruption, and therefore necessarily imports such an user as could be interrupted by some one capable of resisting the claim; and it also requires it to be of right. But this was incapable of interruption by any reasonable mode, and as against them (i.e. the alleged servient owners) it was not of right."

77. In another case of *Partridge* v. *Scott* (3 M. & W. 220, 229), Alderson, B., said: "If the law stood as it did before Lord Tenterden's Act, 2 & 3 Wm. 4, c. 71, s. 2, we should say that such a grant (of easement of support to land) ought not to be inferred from any lapse of time short of twenty years after the

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defendants (the servient owners) might have been or were fully aware of the facts. And, even since that Act, the lapse of time under these peculiar circumstances would probably make no difference. For, the proper construction of that Act requires that the easement should have been enjoyed for twenty years under a claim of right. Here, neither party was acquainted with the fact that the easement was actually used at all; for, neither party knew of the excavation below the house. We should probably, therefore, have been of opinion that there was no user of the easement under a claim of right, and that Lord Tenterden's Act therefore would not apply to a case like this. However, the facts of this special case do not raise that point."

78. In *Staffordshire Canal Company* v. *Birmingham Canal* (Law Rep. 1 H. L. 254), Lord Chelmsford, L.C., says: "The 2nd section of the Prescription Act, 2 & 3 Wm. 4, c. 71, applies to a claim to the use of water, which may be lawfully made at the common law by custom, prescription, or grant. Custom and prescription are here out of the question; and, if the respondents could not have granted the use of the water to the appellants, the Act is wholly inapplicable. To impose such a servitude upon the water in their canal as that contended for by the appellants, would have been ultrâ vires of the respondents, and consequently length of user could never confer an indefeasible claim upon the appellants under the Prescription Act, as no grant of the use of the water could have been lawfully made by the respondents." Lord Cranworth in the same case observed (p. 273): "I do not think that the facts of this case would justify a jury in presuming a grant, even if the respondents' canal had been private property, subject to no statutable duty. Such presumptions are made when without them enjoyment long continued or acquiesced in cannot be reasonably accounted for; but here there is no occasion for any presumption whatever." And Lord Westbury said (p. 278): "If the Prescription Act had been at all applicable, it would be incumbent on the appellants to prove that the right founded on the claim by user might, at the beginning of or during that user, have been lawfully granted to them by the respondents."

79. *Easement must be reasonable.* Another characteristic of an easement is that it must be reasonable. This is said to be common as well to easements and customs as to profits à prendre. An instance of the last is to be found in *Bailey* v. *Stephens* (12 C. B. (N.S.) 91; 31 L. J. (C.P.) 226). The doctrine was authoritatively reviewed and commented on recently in the House of Lords; and, though the case was one of custom of a copyholder in a manor to dig clay on the copyhold estate, and not an easement, yet in this respect, namely, that reasonableness is an ingredient, both rights are alike. Lord Cranworth, in *Marquis of Salisbury* v. *Gladstone* (9 H. L. 692, 702), said: "This is not a custom by which any person is affected besides the lord and the particular tenant insisting on it. It is not like the custom pleaded in *Broadbent* v. *Wilks* (Willes, 360), a custom to lay coals to an indefinite extent and for an indefinite time on the lands of other copyholders, whereby their lands might be made practically useless, although they would still be liable to pay their rents and perform their stipulated services to the lord. Nor is it a custom like that set up by the copyholders in *Wilson* v. *Willes* (7 East, 121), namely, a custom to take turf in an unlimited quantity from the common for the improvement of their copyhold tenements, under which the rights of the other copyholders in the common might be totally destroyed. Nor is it a custom like that insisted on by the lord in *Hilton*

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v. *Granville* (5 Q. B. 701), which would have enabled the lord to undermine the houses of the copyholders, and, without any notice to them, to cause their houses to fall and crush those residing in them, and that without making them any compensation. The custom here insisted on is one which affects no one except the lord and the tenant insisting on the custom; and I can see no ground for holding that it was impossible or even improbable that it might have been the result of arrangements between the lord and his tenants before the time of legal memory." And one of Lord Wensleydale's remarks in the same case is this: "When there is no express grant, but one which is sought to be implied by usage, as a custom is, it is a condition required by law that the custom should not be unreasonable, otherwise the prevalence of the use is to be referred to the ignorance or carelessness of those whose property is affected by its exercise, rather than to a grant."

80. *Easement as against public.* Again, all public nuisances are caused by something done on private property, there being, strictly speaking, no other place where nuisances can be created, as all the real property in this country is vested in some individual or corporation, and the public qua public having nothing but certain rights of passage over parts of such property. A right of navigation can in general be obstructed only by something erected in the navigable water, presenting some physical obstacle; but the other public franchise, that of fishing, which is a public right of the same kind and of almost equal value, may be obstructed, not merely by things done within the area of the public fishery, but by something done beyond the area, in private waters communicating with such area. Now, the only legal way by which the public could have been excluded from fishing in an estuary is by some grant of the Crown made previous to Magna Charta, taking away the public fishery, converting it into a several fishery, and granting it to some individual. If, then, the erecting of a weir in the non-navigable part of a river, which obstructs the passage of fish, and so annihilates the breed of fish, and causes the fishery to be useless to the public, inasmuch as it prevents fish being in the area of the public fishery, the effect is precisely the same as if the public were excluded altogether from entering the area. They may spread their nets, but if, by something done further up the river by a riparian owner, or by the whole combined college of riparian owners, no fish are allowed to come, the public may as well cast their nets on the dry land. Their franchise is destroyed in the one way as effectually as in the other. It would be a strange result, therefore, if the public could only be excluded from fishing in an estuary by a grant of the Crown made before Magna Charta, and yet that the same fishery could be made utterly useless to them and extinguished by a riparian owner against whom the public have no redress. This only shews the absurd consequences to which the doctrine leads, that a fishing-weir or any other weir which obstructs the passage and so extinguishes the breed of migratory fish is a mere common easement, like a right of way or a right of light as between the owners of two neighbouring closes.

As between A. and B., the owners of two adjoining closes, whether A. has or has not a right of way over B.'s close, or B. has a right of window-light over A.'s close, cannot in any shape or form concern the public, who are as well off whether A. and B. have settled between each other or not the mutual enjoyment of their fields and houses in whatever way they please. But it is an entirely different thing to the public when A. has erected a fishing-weir on his part of the river; and, whether B. has assented to A.'s so doing or not cannot in any way bind

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the public, or be allowed to prejudice the public. The two rights are altogether different things, and do not stand in the same category.

If migratory fish grew out of a bed of a river, like mushrooms, and would flourish equally well there if all the other parts of the river were extinguished or separated by barricades from each other, there might be some foundation for the doctrine that what one riparian owner does in one part of the river may ripen into an easement against his neighbour. But, where it is absolutely necessary that each part of a river which produces or rather which holds or sustains migratory fish should have its communication open with the sea,—and not only this, but that there shall be some breeding places between it or beyond it and the sea, to which the fish have free access,—then the law must bend to that state of facts, and the facts are not to be made to bend to some arbitrary rule of law. A farm may keep and maintain game, and the game may flourish and continue to do so for ever, though such farm were physically separated from all other farms and the rest of the globe; but, if the game could not live or exist on the farm without going down half of every year to the sea-side and coming back again, that state of things would necessitate the application of entirely different rules of law for the maintaining and vindicating of the right to such game.

81. *Knowledge of weir, how implied.* Now, assuming that a weir which obstructs the passage of fish is only an easement, let us see how a riparian owner is situated as to his means of knowledge and remedy. A riparian owner has the right at common law to fish, that is, to catch as many fish as he pleases in the half of the stream adjacent to his bank of the river. But, though he has the right to fish, he is not obliged to do so, and his not doing so does not in any way diminish or cause any forfeiture of his right: *Sampson* v. *Hoddinott* (1 C. B. (N. S.) 590). Suppose that A., a riparian owner lower down, say twenty miles off, has set up a weir which obstructs the passage of fish to B.'s part of the river. The water flows on past B.'s land, just as it did before, notwithstanding the weir, for the volume and surface of the water shew no difference and tell no tale. B. cannot tell, by merely looking at his part of the river, whether somebody twenty miles off has set up an obstructive weir in the river. Suppose by his want of success in fishing he suspects that there is an unjustifiable interference with his right somewhere or other, what can he do? He cannot go down the river banks; for, these are private property, and he will render himself liable to an action at the instance of each and all the riparian owners whose banks he traverses. But, suppose B. runs that risk, and walks down the river till he comes to a weir or structure across the river. Assume that he is told it is intended by A. for the catching of fish, must he still further wade in and grope all under the water near the foundations before he can tell whether there are openings sufficient to let some of the fish escape up the river? What then can B. do? He cannot protect himself by setting up a similar weir in his part of the water; nothing he can do in his own waters or land can help him. Suppose again it is a mill-weir, the height of it alone would be primâ facie objectionable, and no one by merely looking at a weir can tell the exact height, and if it be three feet to-day, when he returns next month it may be, for aught he can guess, four feet high. Now, a foot or six inches may make all the difference in the mischief done to him individually. Or, if the weir is too high for fish to jump over, an aperture may be made in the body of the weir which would remove all objections; but, must B. wade into the middle of the river before

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he can judge of this matter? Is B. to take with him theodolites and surveying instruments each time he goes to a mill-weir, in order to register its exact height and conformation? for, if it is four feet high to-day, and after twenty years A. the owner legally acquires an easement to keep a weir of that height, then, if it is six inches higher the next time he visits it, and twenty years have not intervened, B. would be entitled either to demolish that six inches by abatement brevi manu, or at least to bring an action against A. for adding those six inches. Now, all mill-weirs are made higher and higher by imperceptible gradations. Each time it is rebuilt we may be sure, according to the course of human affairs, it is added to and not diminished; and, how or at what stage of this process is the alleged servient owner to take action and interrupt the process? And why is he to be deprived of his property without any compensation, because he hesitates to incur the expense and risk of an action which would be his only remedy besides resorting to the natural but dangerous right of abatement? Now, looking to the enormous difficulties which B. has to encounter, first, in discovering that a weir exists,—for, in order to do so, he has to trespass on the lands of all the intermediate owners,—and when he sees the weir, which we may assume to be a cause of action, he has still the difficulty of exactly knowing the length and breadth of the mischief it does to his own land and the necessity for his putting a stop to it. In the face of all this, what can be more unreasonable than for a court of law to presume that B. has made a grant to A. of the right to do B. all this mischief for ever, as a legal right? A court of law is bound in all things, especially where it has the duty of drawing an inference from human conduct, to act reasonably; and, what can be more unreasonable than to hold that a man consents to and grants away his property for a cause which he may never have heard of or known, may have no reasonable means of estimating when it is known, and has no means of interrupting or preventing except by an enormous expenditure of time, money, and risk to himself? Yet all this injustice must be perpetrated if it is a correct doctrine, that a weir which obstructs the passage of fish is an easement within the Prescription Act. Because he is ignorant of the cause of action, and because he is helpless and without a ready means of self-defence, and because he does not ruin himself by attempting redress by some proceeding at law, he is, according to that doctrine, to be taken to have voluntarily surrendered a most valuable portion of his right of ownership, without any compensation, and without any rational objects, as far as any one can discover or suggest.

82. Another reason why it would be most unreasonable for a court of law to presume that a riparian owner has made a grant to the owner of a weir merely because he has not brought an action against such weir owner, is this: When a weir is set up there may be a hundred riparian owners above it who are each and all equally prejudiced by it. It is, no doubt, true that there are degrees of injury; the quantum of damage may vary, but the injury is the same in kind. A right of action lies at the instance of each severally; for, unless the public generally is injured, no indictment would lie, and each must sue by a separate action for his own particular special grievance. Still, if the weir is illegal quoad one riparian, it would be either illegal quoad all, or at least the removal of the weir would equally enure to the immediate benefit of all. Hence, if one out of the 100 were to fight the battle single-handed, all the ninety-nine would equally profit, without contributing to the expense. This, in the ordinary

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affairs of life, would be a very sufficient reason why one owner would not undertake the expense and risk of the battle; and a court of law, which takes judicial notice of the ordinary course of human affairs, must bear this in mind, when a man is to be punished, and to be taken as forfeiting his rights, merely because he did not vindicate them in an unnatural and an expensive way. Moreover, an owner so prejudiced by something unseen and unapparent is not bound to bring his action until he is actually prejudiced: *Backhouse* v. *Bonomi* (9 H. L. 503).

83. *The Salmon Fishery Act*, 1861. Now, such being the antecedent law, we have to consider what was done by the legislature in 1861, bearing on this subject. The Salmon Fishery Act, 1861 (24 & 25 Vict. c. 109), was passed because the salmon fisheries of England had of late been greatly injured, and for the purpose of increasing the supply of salmon. It was not passed to legalize mill-weirs and fishing-weirs, or to give a parliamentary title to them, if these were not already legal; but it was intended, or at least it might be expected to be intended, to carry on the chain of legislation which, as we have seen, began with or rather preceded Magna Charta. At the date of that Act of 1861, the idea of establishing a court for the express purpose of trying the legality of these weirs was not thought of, and therefore no provisions were inserted to meet such a purpose; and, when the Act of 1865 was passed, no adequate provisions seem to have been even then inserted to meet the evils, but the former Act of 1861 was merely consolidated with the Act of 1865.

84. Any one who compares the Acts of 1861 and 1865 with the previous legislation, which extended over six centuries, cannot fail to see that the legislature had in 1861 lost the thread of the subject, and, instead of providing proper machinery for administering the then existing law, which was all that was wanted, it unfortunately repealed all that law, without taking care that the old statutes in their spirit and tenor were re-enacted and consolidated, or an apt or better equivalent substituted. This repeal of the previous statutes, without taking care to re-enact their essential parts, may lead to difficulties which otherwise would not have arisen, and may irretrievably prejudice rights which were intended to be protected; for as Callis says (Sewers, p. 287), "There is required as great foresight, judgment, and as sound discretion and mature deliberation in repealing of old laws as in making new ones."

85. Now, the legislature, in making new laws, sometimes mistakes the antecedent law, but such mistakes of the antecedent law are not binding on courts of law, which are supposed to have superior means of knowledge. Thus, to take only the latest example, *Reg.* v. *Mayor of Oldham* (Law Rep. 3 Q. B. 474), we find that the legislature assumed the law to be that property held for public purposes, meaning thereby not purposes of government, was exempt from rateability to the poor, and legislated on that assumption, whereas the courts of law thirty years after the Act was passed declared that the antecedent law was the reverse of what the legislature had assumed. Now, such a mistake on the part of the legislature, though not binding on courts of law generally, may yet have a considerable effect on the construction to be put on the statute which has been passed under such misapprehension. It is not, however, necessary for us to go into the question how far the legislature in 1861 may have misapprehended the antecedent law. This is shewn chiefly by the omission to provide for things which had been provided for by the previous statutes.

86. *Grant, charter, or immemorial usage.* But at present we have only to deal with the two late Acts so far as fishing-weirs and fishing mill-dams are concerned. The Act of 1865, s. 42, says, that the commissioners may inquire into the legality of all fishing-weirs and fishing mill-dams, and do certain things to those which are illegal; and on looking back to the Act of 1861, s. 12, that Act seems to have assumed all these fishing-weirs and fishing mill-dams to have been legal in their then state, which were "lawfully in use at the time of the passing of the Act of 1861 by virtue of a grant or charter or immemorial usage." It would have been perhaps better if, instead of saying "lawfully in use by virtue of a grant, charter, or immemorial usage," the statute had simply used the words "lawfully in use" without adding more; and that is really the substance of all that could have been meant. What the legislature, however, did was, to go on and attempt to explain the only heads of law under which, as it conceived, these things could have been "lawfully in use;" and these heads are "grant, charter, or immemorial usage." Now, when examined by the light of the antecedent law, those words are strictly correct, and they entirely exclude the notion that the legislature thought that the Prescription Act could have anything to do with such a right; and, having regard to the nature of the thing itself, and to the long series of statutes, it is obvious that it must be so. The Prescription Act only applies to such rights as could be granted by the servient owner during each or any part of the prescriptive period. (See ante, §§ 75—78.)

Now, if the right was either prohibited by existing statutes, or derogated from previous public rights, it is plain it could not have been granted during the last twenty years, and therefore could not be reasonably presumed by a court of law to have been so granted, for there is nobody authorized to give away or surrender public rights: *Vooght* v. *Winch* (2 B. & A. 662); *Mayor of Nottingham* v. *Lambert* (Willes, 116).

Moreover, even if there were no statutes touching the subject before 1861, and if the right in no way affected the public interest, still there is the series of decisions already referred to that the Prescription Act does not apply to any negative easement (and this is substantially a negative easement, if any), or to any easement which could not have been interrupted during the alleged prescriptive period without an unreasonable waste of labour and expense. Therefore, even though we regard the antecedent statutes as inapplicable, yet, according to the doctrine of the common law, the Prescription Act could not apply. (See ante, §§ 69—80.)

87. If, then, the Prescription Act could not apply, the establishment of the right must be thrown back on the antecedent law of prescription, which was based on the doctrine that the right claimed had been exercised from the beginning of legal memory, that is to say, from 1 Ric. 1 (1189), or to have been expressly granted since that time by some one cognizant of the claim, capable of interrupting it, and capable of granting the right. And it follows also, further, that those who resist the claim may now defeat it by proving its non-existence or impossibility of existence any time subsequent to 1189. Now, the words "grant" and "charter" sufficiently cover all possible modes of acquiring the right otherwise than by immemorial user, and immemorial user means user since the year 1189, if the Prescription Act does not apply.

88. The only qualification necessary to be made to this statement of the law

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would be on the hypothesis that the statute 12 Edw. 4 applied to the case, and legalized all weirs then existing, or all weirs existing before Edw. 1; but, inasmuch as the same evidence that would generally establish the legality of a weir by reason of its existing before 12 Edw. 4 would also establish its existence before Edw. 1, the slight difference on that ground would be trifling; and, in either view, the words "grant" or "immemorial usage" would cover both hypotheses.

89. *Rolle* v. *Whyte*. Now, the Court of Queen's Bench, in the recent case of *Rolle* v. *Whyte* (Law Rep. 3 Q. B. 286), which was an appeal from a decision of the commissioners as to the legality of a weir in a non-navigable river, has laid down certain propositions of law which seem necessarily to overrule the great array of conflicting authority already referred to. That decision seems to lay down the following points: First, that there was no statute before 1861 which prohibited any weir, either fishing-weir or otherwise, in a non-navigable river, however destructive to the riparian owners or to the public franchise of fishery: Second, that a fishing-weir is an easement: Third, that it is an easement within the Prescription Act. Now, with great deference, each and all of these propositions seem irreconcileable with the statutes and the authorities previously cited.

90. First, as to the statutes. The Court has arrived at its conclusion by confining its attention to two or three only out of the series of statutes, while it omitted to notice the most important statutes of Edw. 1 and Ric. 2, which, Coke and Hale both say, extend to every stream, however small, which salmon frequent. The only authority referred to by the Court for this construction of the statutes is an obscure dictum of Callis, which, as already observed, when fairly construed, bears rather the contrary meaning to what was given to it; but whatever that meaning may be, Callis expressly repudiated giving any opinion on the statutes so far as they concern fisheries and "other businesses not pertinent to sewers," and therefore his opinion cannot in any view be of much value, especially if it be taken to overrule Coke and Hale. Moreover, the Court seems to have proceeded on the tacit assumption of fact, that fish could not pass over a mill-weir unless the whole weir were demolished,—thereby implying that mills were incompatible with the free passage of salmon. Now, there was no evidence in that case which could possibly have led to this conclusion; and, if a judicial knowledge of that fact was assumed, it is irreconcileable, not only with the recitals in the statutes already quoted as to the natural history of the salmon, but with ordinary experience and observation.

91. Another assumption on which the Court seems to have proceeded, was, that it is because the public have the right to navigate that they have the right to fish,—treating the right to fish as incidental to and coinciding with the right to navigate; for, the Court (Law Rep. 3 Q. B. 301) says: "Again, as regards the fish, inasmuch as the public generally have a right to fish in navigable rivers, the destruction of the fry by means of weirs in such rivers was matter of public concern, and became a fit subject of imperial legislation." Now, it has been already shewn that the public have no right to fish in navigable rivers unless the tide extends to the spot; and there may be five, ten, or twenty miles of navigable river where the public have the right to navigate but no right to fish, and therefore the protection of fish in navigable rivers only could not in that view be of any public concern. Again, the Court says: "The idea of prohibiting an easement which might otherwise be lawfully acquired, and thus to interfere with private rights, in order to

secure to the public a larger supply of an article of food, does not appear to have occurred to our earlier legislators." Now, it has been already shewn that this increasing of the supply of salmon was the main object of all the statutes, not only according to the authority of Coke, but according to the Rolls of Parliament in the time of the first three Edwards. (See antè, §§ 52—55.)

The sole object of the greater part of the series of the statutes is expressly stated to be to secure the public a larger supply of fish; and a petition of 1 Edw. 3 has been quoted from the Rolls of Parliament, saying that salmon have become five times dearer in consequence of the weirs in the Thames; and all the legislation for six centuries proceeded on the footing of restraining private owners, in order to secure a plentiful supply of salmon. What else was the institution of a close season, which has existed since the time of Edw. 1, and has prohibited all the private owners of the kingdom from catching fish for several months in the year, but a restriction put on private owners for the purpose of providing a larger supply of salmon? Coke says: "Salmon is victual of great and precious account; and, what is more necessary than increase of victual?" So that it cannot have been from any delicacy on the part of the legislature in restraining private owners; for, there was the statute of 17 Ric. 2, enforcing on all the weir owners of the kingdom a reasonable aperture in their weirs. It may be said with accuracy, that for five and a half centuries the legislature has taken out of the pale of private ownership anything that interferes unduly with the preservation of the breed of salmon, and treated the subject as within the common police of the realm.

92. In the next place, the Court of Queen's Bench in *Rolle* v. *Whyte* (Law Rep. 3 Q. B. 286) assumes that a fishing-weir is an easement. Now, no authority is referred to for that proposition; and, as there was no evidence given in that case which could have warranted any such conclusion, it is obvious that the Court must have proceeded on some judicial knowledge of the facts as to the operation of a weir and the mutual relations of parties affected by it. Whatever may have been the details of that judicial knowledge, it is irreconcileable with the statutory account of the natural history of the salmon, which may be read in the recitals of the statutes for the last six centuries. Before a court of law can arrive at the conclusion that a weir is an easement, it ought to have some evidence of the facts pertinent to that conclusion, and which have been already sufficiently referred to.

93. *Blind enjoyment.* But the Court not only assumes in *Rolle* v. *Whyte* (Law Rep. 3 Q. B. 286) that a fishing-weir is an easement, but it seems also to assume that an easement may be acquired otherwise than by grant; for, the Court, after reviewing some of the early statutes, says (p. 302): "For these reasons, it seems to us clear, that, though weirs in navigable rivers are illegal unless they existed before the time of Edward 1, such an easement may be acquired in private waters by grant from other riparian owners, or by enjoyment,—in short, by any means by which such rights may be constituted." This implies that a grant is merely one out of several ways of constituting an easement, and in particular that "enjoyment" is something different from a grant, not to speak of the other words, "any means by which such rights may be acquired." Now, it has always been well settled in the law of easements, that there is no other way known to the law by which an easement can be legally created or acquired than

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by grant. Thus, to take only one of the most recent cases, Lord Cairns, in *Rangeley* v. *Midland Ry. Co.* (Law Rep. 3 Ch. App. at p. 310), lays down this as an elementary proposition: "Every easement has its origin in a grant, expressed or implied. The person who can make that grant must be the owner of the land." If the grant or deed cannot be produced, or is lost, then prescription or immemorial usage is merely its indirect evidence,—the evidence of a lost grant. Mere enjoyment per se, mere blind enjoyment, continued for any length of time, will never constitute an easement; it must be an enjoyment under peculiar circumstances, and accompanied with certain well-known characteristics, all of which are conspicuous for their absence in the present case. Now, these qualifications seem never to have occurred to the Court in deciding the case of *Rolle* v. *Whyte* (Law Rep. 3 Q. B. 286); and on that ground the decision is irreconcileable with the previous authorities. The Court seems to have assumed that there was some mode of acquiring an easement called "enjoyment," which was distinct from a grant; for, another sentence in the judgment is this: "It is impossible to suppose that the legislature intended to make a distinction between an easement acquired by grant and one acquired by length of enjoyment,"—thereby implying that the two things are distinct; and then the Court goes on to state what is said to be a liberal construction of the Salmon Fishery Act, in order to give effect to this view of the law as to "enjoyment."

94. Now, if authority be necessary to shew that mere enjoyment per se is no proof of a grant, it may be enough to refer to two cases, besides the authorities already quoted. (Antè, §§ 74—78).

In *Gray* v. *Bond* (2 B. & B. 671), Dallas, C.J., thus speaks of blind enjoyment: "I agree with the argument that mere lapse of time will not of itself raise against the owner the presumption of a grant. When lapse of time is said to afford such a presumption, the inference is also drawn from accompanying facts; and here, where there is no direct evidence whether or not the owner of the land had any knowledge of what passed, the inference to be drawn must in a peculiar degree depend on the nature of the accompanying facts; and the presumption in favour of a grant will be more or less probable, as it may be more or less probable that those facts could not have existed without the consent of the owner of the land." So, in *Daniel* v. *North* (11 East, 372), Lord Ellenborough, C.J., said: "The foundation of presuming a grant against any party is that the exercise of the adverse right on which such presumption is founded, was against the party capable of making the grant; and that cannot be presumed against him unless there were some probable means of his knowing what was done against him." And Le Blanc, J., says, that the presumption is only made because an immediate and palpable injury is done to the possession of the land held by the servient owner.

95. And this brings us to the last comment on the case of *Rolle* v. *Whyte*, (Law Rep. 3 Q. B. 286), which is this, that, even if it be admitted that a fishing-weir is an easement, still it is not an easement within the Prescription Act. Now, on this subject, the Court has again adopted a construction of the Prescription Act which is at variance with the whole course of decisions under that Act since it passed in 1832.

What the Court in *Rolle* v. *Whyte* has said on the subject of the Prescription Act is this: "Under the old law a jury would have been told to presume a grant from a user of sixty years. The Prescription Acts have substituted fixed periods

of enjoyment for the fiction of lost grants." Now, there is only one Prescription Act, namely, the 2 & 3 Wm. 4, c. 71, and it was well settled law before this decision that that Act did not in any way alter or dispense with the necessity of presuming a grant where a grant required to be presumed before that Act, and no authority is referred to for saying that mere "enjoyment" has become a substitute for the fiction of lost grant. The only case in which mere enjoyment, or, as it may be more properly called, blind enjoyment, is substituted for the fiction of lost grant, is the case of window-lights, and that is put on a new and independent footing; and, even in that case, the dominant tenement, with its incipient easement, is a known, definite, visible thing, and the servient owner has the means of protecting himself by erecting a screen in front of his neighbour's windows so as to interrupt the enjoyment, and so preserve his right.

96. But, in all other cases, it is settled that the kind of easement as to which twenty or forty years' user is accepted as conclusive evidence under the Prescription Act of the right claimed, must have these characteristics; it must be a positive easement, that is, it must be an easement enjoyed *in and upon* the neighbour's land; the easement must have some visible and patent effects, so that the servient owner may judge what is the precise definite injury it does to his land; it must inflict an injury which the servient owner is capable of interrupting, and not only of interrupting, but of doing so without an unreasonable waste of labour and expense. Now, each and all of these characteristics are wanting as to a fishing-weir; and hence it follows, as a logical necessity, that it cannot be an easement at all; or, at all events, it is not an easement within the Prescription Act; and, if it is not within the Prescription Act, then the alleged servient owner may defeat the claim by shewing that it has been first used or enhanced since the beginning of legal memory, that is, any time since the year 1189, or 1 Ric. 1, or, if the statutes of 17 Ric. 2 and 12 Edw. 4 apply, that it was not in existence before those statutes. (See antè, §§ 69—82.)

97. *Effect of Rolle* v. *Whyte.* Now, the effect of the decision in *Rolle* v. *Whyte* (Law Rep. 3 Q. B. 286) seems to amount to this:—If any person who owns a fishing or mill-weir in a non-navigable river, and can prove a blind enjoyment of it, i.e. an uninterrupted enjoyment of it, for twenty years, he has at the end of twenty years, or at the utmost forty years, acquired a good title against all the world; and this is so, even though all the rights of fishing of the riparian owners for a hundred miles up the river are rendered thereby useless, and also the right of the public in the estuary rendered utterly unprofitable, and though ninety-nine out of these 100 riparian owners may never have known even of the existence of such weir, and have had no reasonable means either of knowledge or of self-defence against the injury it has thereby created and perpetuated. In short, the rights of all the riparian owners of the river, and of the public in the mouth of the river, may be confiscated, not only without compensation, but even without their having any knowledge or suspicion of the existence of the cause of injury. We think this is the logical result of that decision of *Rolle* v. *Whyte.*

98. *Salmon Hall Coop Fishery.* The present claim was made by the Earl of Lonsdale to maintain a coop or fishing apparatus at Salmon Hall, on the river Derwent, in Cumberland. The river at that point is not navigable nor tidal, the coop being situated about half a mile above the tidal flow, and only about three miles from the sea. The coop is a box constructed within an aperture of a weir

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or dam which is built diagonally across the whole of the river from bank to bank, and as it was used before 1861 it had no gap or opening during the fishing season. There is at this part of the river an island which may be said to form part of the dam, the river being thereby subdivided into two branches. That branch which is the larger one next the left bank, contained two coops, called the upper coops; and the smaller branch of the river contained a single coop, called the lower coop. The lower coop has been since 1861 closed up altogether, and one of the upper coops has been converted into an open fish-pass, so that now one coop only is used and claimed. But, practically, it makes little difference what number of coops may be in a dam, if the rest of the river is closed up at the place, and all the fish that wish to pass must go into the only coop or coops which are placed in the dam.

The Derwent is a salmon river of great value. At Cockermouth, which is about eight miles further up than Salmon Hall, the river receives a large tributary called the Cocker, and the upper parts of these rivers run through several large lakes, one four miles long, other two being each three miles long; there being also smaller lakes; and beyond these lakes there are tributaries well adapted for breeding salmon, whereby the value of the river banks for all those distances is greatly enhanced to the owners, and must have been so "since the globe assumed its present form."

Before 1861, when the Salmon Fishery Act passed, the coops together with the weir or dam in which the coops were fixed entirely obstructed the river, and the owner of the coops might have prevented every fish going up the river during the open season, subject to a qualification prescribed by the Solway Amendment Act of 1809 as to the width of the interstices forming the back or upper side of the coops. Beyond such fish as were small enough to struggle through those interstices of the coop, the owner of this coop allowed fish only to pass at his discretion; there being, however, occasional floods during which probably a few fish escaped over the top of the dam and coops. Since the Act of 1861 passed, the fish-pass referred to was made by throwing open one of the coops, in order to comply with the 12th section of the Act of 1861, which enacts that no fishing-weir or fishing mill-dam shall be thenceforth fished, unless it has a pass approved by the Home Office. The issue which we have to try is, whether this dam or weir was legal as it stood before 1861, for no larger right can have been gained since that date.

At this stage, it may be proper to notice the local Acts which were passed in 1804 and 1809 to regulate the fisheries of the Solway and the tributary streams thereto, including the Derwent. By the Solway Fisheries Act, 44 Geo. 3, c. 45, an annual close time and other things were prescribed; and in s. 15, it was enacted that "no person whomsoever shall use any grate, heck, gate, or other engine or device whatsoever used for the purposes of a grate, heck, or gate, in any fishery, fish-lock, coop, bay, or other work in any river, &c., whereof the bars or staps shall be otherwise than perpendicular and of an oval shape, with the edges rounded off, and whereof the width or space between each bar or stap shall be of a less size square or width than three inches." The only other material sections of that Act, the 13th and 14th, enacted that nothing in the Act should affect the construction of any mill-dam, caul, dam, dyke, or fish-gap, theretofore legally established; and nothing should legalize or demolish, or take away or destroy any net, fish-lock, coop, bay, or other work which might have been lawfully erected, put, placed, fished, or used, nor the present modes or methods used for taking and killing fish

other than are particularly mentioned. The result of these three sections, so far as related to the Salmon Hall coops, was this:—The Act neither legalized them if previously illegal, nor made them illegal if previously legal, but left them exactly as if the Act had never passed, except that it made it peremptory on the owner, be they legal or illegal, to make the hecks thereof perpendicular, and the bars or staps at least three inches apart from each other.

In 1809, that is, five years after the Act just mentioned, a private Act passed, 49 Geo. 3. c. 2, intituled an Act for amending the other Act so far as respects part of the river Derwent. This Act recites the close season that was enacted by the Act of 1804, and the provision as to the bars of the hecks being perpendicular, being of rounded edges, and being three inches apart, and that it had been the usage or custom in Lord Lonsdale's fishery in the Derwent to use grates, hecks and gates of the width of one inch and a half, and that the restriction of and from using grates, hecks, or gates of the width of three inches had been and would be a great loss to the said Lord Lonsdale, unless some relief be granted to him in those respects; then the 2nd section enacted that "it shall be lawful for the said Earl of Lonsdale to erect, place, and make use of any grate, heck, gate, net, or other device for the taking or catching of fish, of the width or space between each bar, stop, or mesh, of one inch and a half, anything in the said recited Act notwithstanding."

Now, one of the questions raised in this case was, what was the precise change made by the second Act upon the first Act as to the kind of hecks and bars to be thereafter used in the Salmon Hall fishery. On the one hand, it was contended that the only alteration permitted by the second Act was as to the width between the bars, but not as to these bars being perpendicular or of oval shape; while, on the other hand, it was contended that the amending Act permitted any grate whatever to be used, either perpendicular or horizontal, and that as they used to be horizontal before the Act of 1804, it must be presumed the Act of 1809 permitted the owner to revert to the original mode of user. We are of opinion that the correct construction of the second Act was, that the only alteration in the former Act effected thereby was as to the width between the bars, and that Lord Lonsdale acquired under that private Act no authority to use the bars horizontal. Any one conversant with fisheries knows the great difference as regards the facility of passage of fish between bars of the same width when placed horizontally and perpendicularly. That Act being a private Act, and every degree of closeness in the hecks being at the expense of the other riparian owners, and also of the public so far as they were interested, and none of whom were parties to that Act of 1809,—in such a case the correct principle would be to construe the Act most strictly against Lord Lonsdale. And, inasmuch as it is not expressly stated in the private Act that the bars of the hecks might be used horizontally instead of perpendicularly, the presumption is that the legislature did not intend to sanction horizontal bars, for, if so, that important point would have been expressly stated. Whatever relaxation of the Act of 1804 was effected must be taken as strictissimi juris. But, we are further of opinion that the effect of Lord Lonsdale using the bars horizontally, and therefore illegally, between 1809 and 1861, was not to cause a forfeiture of his right to use the hecks at all. The only remedy was for parties who felt aggrieved to have proceeded for the penalties defined by the Act of 1804; and if they allowed such illegal user to go on, and if they suffered damage therefrom, they had only themselves to blame. We think the

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fact of the Act of 1804 being violated did not in point of law operate as any forfeiture of the right to keep the coops, if there was any such right before.

The result, therefore, is, that these two Acts of 1804 and 1809 do not at all affect the question of legality or illegality of the coop at Salmon Hall, but leave the question as they found it. The title must thus rest on grounds independent of these two statutes.

99. *Titles relating to fishery.* It was proved that the manor of Seaton, now the property of Lord Lonsdale, extends from a point nearly half a mile above the coops down the right bank of the river to the sea. The manor of Stainburn extends from a point more than half a mile above the coops on the left bank to the Workington mill-weir. The manor of Workington extends from the Workington mill-weir on the left bank of the river down the same river bank towards the sea.

In reference to the issue of legality of this Salmon Hall fishery, numerous ancient deeds and documents have been put in evidence both by the claimant and by the other riparian owners, as well as by those representing the public. There was a local Act of 6 & 7 Edw. 1, for the county of Cumberland, already referred to (antè, § 57), from which it appears that a gap must at that time have been in the midstream of all weirs on the rivers in Cumberland; and at that period there seemed to be no weirs which had not that gap, or at all events which were then legal without such gap. And the weir or weirs at Stainburn and Workington, mentioned in that local Act, were described as having those gaps at that period. Now, that local statute being made since the time of legal memory, the inference from its terms is, that, if Salmon Hall weir then existed, the gap must have been filled up since. Another ancient document, the judgment-roll of 45 Edw. 3, already referred to (antè, § 59), confirmed that law and the state of facts to be presumed at that time. And so did the Inquisition, 17 Ric. 2 (antè, § 60), which was dated the same year that the general statute of 17 Ric. 2 was passed, enforcing reasonable apertures in all weirs throughout England. The extract from the Elizabethan survey, already referred to (antè, § 61), is consistent with the other evidence which all points to this conclusion of fact, that, though there seem to have been coops put up at Workington weir some time about the reign of Elizabeth, there is no allusion to anything corresponding to the present coops at Salmon Hall; and the inference is that no such coops then existed.

The office-copy of a decree in Chancery dated 1613, and also produced, stated that Philip Lord Wharton exhibited his bill of complaint against Nicholas Curwen, reciting that plaintiff's grandfather by deed granted for ever, at a rent of 10*l.* and thirty salmons per annum, the free and several fishing in the river Derwent at Workington, to Sir Henry Curwen, with full and free liberty to make weirs and stops in the said river, and to place ark-nets and other engines in the said river, to take fish therewith in the same river at Workington, with power to distrain for the rent; that complainant's grandfather died, and complainant's father, the son and heir, became entitled; and that defendant's father held and occupied the said fishing, and had made arks and engines for fishing in the said water; and, though then in arrear for five years' rent, he refused to pay, he having acquired possession of the original grant or conveyance, whereby the plaintiff had no remedy, and was unable to recover the said rent and arrearages. The defendant's father made answer that he was seised of the manor and fishing,

and was entitled to the fishery in his own right as lord and owner time out of mind, and traversed the material points of the bill. The cause came to a hearing, and, the defendant's father having died, the suit was revived against the defendant, and ultimately, by consent, the Lord Chancellor Ellesmere by decree ordered that the defendant should not claim any fishing under a grant from the plaintiff, and the plaintiff should not demand any rent from the defendant, but that the plaintiff might take what remedy he could at common law for the arrears.

There was also produced an exemplification of an order and decree of the commissioners of sewers, made in 1653, which recited that whereas the fishgarth of Seaton upon the river Derwent belonging to Sir Patricius Curwen was complained of that the same was an annoyance and nuisance to several the inhabitants living near the said river, and was very prejudicial to the good and benefit of the country, by reason of the enhancement in height and breadth of the said fishgarth, contrary to the ancient and accustomed height thereof, as was pretended; that, on a view and survey and examination of witnesses on oath, as by the verdict more at large appeared, and on mature and deliberate consideration of the premises, the commissioners were fully satisfied that the said Sir P. Curwen had not enlarged nor enhanced the height and breadth of the said fishgarth contrary to the ancient and accustomed height and breadth thereof as had been used and accustomed time out of mind whereof the memory of man was not to the contrary. Therefore, "the commissioners do order, declare, and decree, that the said fishgarth is of a lawful height and breadth, and that the same ought not to be lessened or diminished, nor the said Sir P. Curwen molested and disturbed in the peaceable possession, &c., and that the said fishgarth may be continued of the same assize and scantling in height and breadth as now it is."

The verdict referred to in the above decree describes the weir as lying within his manor of Workington, Stainburn, and Seaton; and this identifies the weir which was the subject of that inquisition and decree as being not the present weir at Salmon Hall, but the weir called Workington mill-dam, which is more than half a mile further down.

There was further produced an indenture dated the 16th of June, 1742, whereby Charles Pelham, in consideration of a rent of 50*l*., demised for twenty-one years to Andrew Green, all that the said salmon fishing or piscary in the river Derwent, situate, lying, and being at or near the townships or villages of Workington, Seaton, and Stainburn, in the said county of Cumberland, together with all and singular fishgarths, coops, fishings, fishing-waters, and liberties of fishing, &c., with liberty to take stones, whins, &c., to repair the said coop, fishgarth, or weir, making reasonable satisfaction for damage by working of quarries. This deed is of great importance when taken in connection with the next deed now to be referred to.

By a grant and release dated the 29th of August, 1751, Charles Pelham sold for 3,750*l*. to Henry Curwen, certain messuages, and inter alia "also all that his free and several salmon fishing and piscary for taking salmon and all other kinds of fish whatsoever in the river Derwent, situate, lying, and being within and parcel of, or reputed to be parcel of, the respective manors of Seaton, Stainburn, and Workington, in the said county of Cumberland, together with the fishgarth and coops *now placed and being nigh* Seaton Miln, within the said manor of Seaton, and all and singular coops, &c., which said salmon-fishing is now in the possession of one Andrew Green, as under-tenant thereof," except nevertheless certain

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liberties as to cutting hazel and getting stone in the manor, together also with full and free liberty to and for the said Henry Curwen, his heirs and assigns, and his and their servants, agents, and workmen in that behalf, from time to time and at all times hereafter to make and erect any new or other weir or weirs, fishgarth or fishgarths, and coop or coops, for the better enjoyment of the said fishings or piscary across and in any other part of the said river Derwent, within the said manors of Seaton and Stainburn, than where the present coops and fishgarth are now placed, as to the said Henry Curwen, his heirs or assigns, shall seem meet and convenient; provided, nevertheless, that no damage be done to the mill-race or weir, or any other damage be done to any of the water corn-mills of the said Charles Pelham situate on the said river Derwent near Seaton aforesaid, or to any of his lands, tenements, or grounds adjoining to the said river by such new weir, fishgarth, or coops, which the said Henry Curwen, his heirs and assigns, are hereby empowered to erect as aforesaid, or by removing or altering the said present weir, fishgarth, and coops, or any of them, and for that purpose to take and carry stones, gravel, &c., without paying for the same, as may at any time hereafter be wanted for such new erections, or for the repairs of the present fishgarth, coops, and weir near Seaton mills aforesaid, or for the repair of the mills or millgarth of the said Henry Curwen, situate at Workington aforesaid, on either side the channel of the said river Derwent within the said manors of Seaton and Stainburn, the said Henry Curwen making compensation for any damage done in so repairing the fishgarth or coops, or altering or removing them.

By deeds of lease and release dated the 17th and 18th of September, 1751, Henry Curwen, in consideration of 4275*l.*, sold and conveyed to Sir James Lowther the same messuages embraced in the deed last quoted; and the description of the fishgarth at Salmon Hall is repeated verbatim.

In 1758, Charles Pelham sold to Sir James Lowther the manors of Seaton and Stainburn and others.

On the 8th of March, 1762, Sir James Lowther demised for ninety-nine years, at a rent of 40*l.*, to William Hicks and others, a piece of ground called Barepotts meadow, with liberty to erect furnaces and forges, and to make a trench out of Seaton mill-race, and to draw water from the river Derwent, so far as no damage should happen to the working of Seaton mill or to the fishery in the river Derwent, with liberty to Sir James Lowther to hang hecks at the flood-gates.

On the 19th of December, 1798, Andrew Green sold to Anthony Peat for 500*l.* certain tenements known as Salmon Hall. On the 2nd of October, 1802, Lord Lonsdale demised for one year to Anthony Peat "all that his free and several salmon-fishing and piscary for taking salmon and all other kinds of fish whatsoever in the river Derwent in the said county, situate, lying, and being, and part of the respective manors of Seaton, Stainburn, and Workington, in the said county, together with the fishgarth and coops *now placed and being nigh* Seaton mill within the said manor of Seaton, and all and singular other," &c.

In 1853, Anthony Peat and others, in consideration of 2750*l.*, conveyed to the Earl of Lonsdale the Salmon Hall estate.

The title of Lord Lonsdale to the various parcels of property acquired at the above dates respectively is undoubted; but the question is, whether the title to maintain this weir or coop has been proved. It is necessary, however, first to notice the oral evidence also given in the case.

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100. *Oral evidence.* The oral evidence given by aged witnesses was to this effect:—One aged witness recollected when the hecks were used perpendicular, and that they were afterwards when he was a boy changed to horizontal, and so continued till 1861; and the other evidence was to the same effect. This evidence corroborates the statement of Lord Lonsdale's advocate, that the hecks had been made perpendicular after the Act of 1804, but, when the Act of 1809 passed, they were changed into horizontal bars, and had ever since been so used. During the last sixty years, the height of the weir had not been changed in the general arrangement and situation of the coops, except as to this change of hecks from perpendicular to horizontal. No witness remembered whether before 1804, the date of the first Solway Fishery Act, the hecks had been horizontal or not. Besides the perpendicular hecks placed in the apertures of the weir or dam, there was also a set of horizontal hecks extending all along the top of the weir or dam and placed almost close to the dam. These weir hecks have the effect of preventing fish jumping over the weir, which the fish might otherwise do but for these hecks.

These weir-hecks not only completely prevented fish attempting even in floods getting over the weir, but the kipper fish in coming down the river were often stranded on these weir-hecks and found dead. The men sometimes kicked them off into the river, and as many as nine fish had been seen lying dead at one time on the weir-hecks. These weir-hecks were continued during all the close season as well as the fishing season, and as far as any witness remembered they had always been there.

The only other matter of importance in the oral evidence was as to an action which was brought against Lord Lonsdale's tenant for keeping this coop at Salmon Hall. In 1819, an action on the case was brought by Wilfred Lawson against John Peat, for erecting stells and coops which prevented the fish coming into the plaintiff's fishery situated higher up the river, and prevented him, the plaintiff, using his fishery in so ample a manner. There were also counts for erecting and maintaining coops higher and closer than they ought to be, and keeping the hecks in a horizontal instead of perpendicular position; also keeping coops in a different position from what they ought to have been. The defendant pleaded the general issue; the parties went to trial, and the plaintiff was nonsuited. Several reasons were suggested why that action broke down; but it is enough to say that the result of the action makes the owner's claims to the coop neither better nor worse for the purpose of this inquiry. No action seems to have been brought before or since 1817. But one of the oldest witnesses, who was a servant of the lessee of the fishery, said that the Cockermouth people, i.e. the people living about eight miles further up the river, had often threatened in his time to come and pull the coops down.

A witness was called for the opponents of the weir, who had been present at the trial of 1817; and it was proposed to ask this witness what one of the witnesses, examined in his presence at that trial and since deceased, had said as to the origin of these coops. It was contended that this evidence was admissible, and the case of *Reg.* v. *Bedfordshire* (4 E. & B. 535) was referred to. On the other hand, it was contended, that such evidence was inadmissible, as being that of a deceased person not disinterested, and not antè litem motam. We rejected the evidence. It was further proposed by the opponents of the coops to put in evidence

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counsel's notes on his brief of the evidence of the witnesses at the trial of 1817, both witnesses and counsel being since deceased; but we also rejected this evidence.

The opponents of the coops also tendered an aged witness, who had frequently heard his grandmother, since dead, who was a daughter of the lessee of the fishery, say that the coops had been removed by her father about 1741 to Salmon Hall, from the Workington weir, where they had formerly been used, and which weir is half a mile further down the river. The owner of the coops objected to this evidence as hearsay; but the opponents contended that, as this was in the nature of a restriction on a public right, and was a nuisance prohibited by ancient statutes, the evidence of hearsay for and against public rights was admissible. We admitted the evidence; but we feel bound to say that it is quite unnecessary to rely on that evidence, inasmuch as we have come to the conclusion that the deeds themselves clearly prove the same fact which it was the object of that hearsay evidence to establish.

101. *Contention of Parties.* It was contended by the owner of the coop, and some evidence was offered to prove, that he had a several fishery in the tidal part of the river below the coop down to the sea, and that the public had no right to fish there, and so could have no possible interest in this weir, whether it was legal or illegal; and that it was entirely a question as between the owner of the weir and the other riparian owners; that, either by virtue of the Prescription Act, or at all events on some ground or other arising from the long user, this coop was legal in all its parts as now used, both in the coop-hecks and the weir-hecks; and that the owner was willing that the lower coop be permanently shut up, and was also willing to level the floor of the present pass, if we considered it objectionable on the ground of its present bed being higher than the bed of the river, and so tending to hinder the fish getting through. With regard to the point as to Lord Lonsdale having a several fishery from the sea to the site of the coop, we do not consider it necessary to come to any conclusion; and what we decide does not, and is not to be taken to, affect that question one way or the other, as we think there is enough to proceed upon without deciding that identical point.

On the other hand, it was contended by the opponents of this coop, that it was illegal altogether in all its parts; that the deeds and documents in evidence shewed that the coops had been for the first time set up some time between 1742 and 1751, and that this was clearly proved on the face of the deeds themselves; that, if that was the fact, then this fishing-weir could not be legal, either by virtue of any grant, charter, or immemorial usage, and that the Prescription Act did not apply to the case, and therefore they were entitled to shew a modern origin within legal memory, and, if proved, then it followed that the coop was illegal; that, at all events, the floor of the present pass was not level with the bed of the river, and ought to be made level; and that the weir-hecks were altogether unjustifiable in any point of view, and ought to be abated and removed.

102. *Principles on which to be decided.* We are of opinion, for the reasons already stated at great length, that the Prescription Act has nothing to do with the present question; and that, if it can be proved that the coops have been set up since legal memory, not as a continuation of previous coops, but independently, or, at all events, if set up since the statute of 17 Ric. 2, or at the very latest since 12 Edw. 4, the coops are illegal. But then the Court of Queen's Bench has laid

down the law in *Rolle* v. *Whyte* (Law Rep. 3 Q. B. 286), which was also a case of a weir in a non-navigable river, to be, that the Prescription Act has everything to do with the present question, and, if the owner can prove that he has used without interruption this weir and coop twenty years before this inquiry, or at most forty years, that he has acquired a legal title against all the world; and, though the effect may be, and necessarily must be, all but to confiscate the most valuable riparian rights of all the owners further up the river and its lakes and tributaries, who may never have had the knowledge or the means of knowledge or of resistance, yet the legal result must be that all these owners have now forfeited these valuable rights for ever, and surrendered them as completely to Lord Lonsdale as if they had met in public meeting at Cockermouth and with one consent resolved to make a present of all their common law rights in this river; and that without the shadow of a motive, far less without the shadow of a valuable consideration, for their so doing. We have already stated that we can find no legal principles to support any such conclusion, and have stated what are the principles which would lead us to the contrary conclusion.

103. *Conclusions of fact and law.* The conclusions of fact we come to in the case are as follows:—We hold it to be clearly proved on the face of the titles themselves, that the Salmon Hall coops were first put up somewhere between 1742 and 1751; and we hold that, notwithstanding the user since that date, which apparently has not been interrupted except by the unsuccessful action in 1718, the coops and hecks are now altogether illegal. We also have come to the conclusion that this is not a fishing-weir pure and simple, but a fishing mill-dam, inasmuch as the apertures in the weir devoted to fishing purposes, and through which the water flowed, could not be further enlarged without injury to the milling power; and that the combination of the solid parts of the weir and of the coop openings does not more than suffice for the milling power; and, though in our opinion the requirements of the mills could not according to any legal principle be allowed to interfere with the passage of fish to the upper waters, we think that no larger milling easement has ever in any view been acquired than what is represented by the solid parts of the weir. It is true that, when the lower coop was open, the milling easement must have been further subject to the deduction of water which flowed through that aperture. But the gain of water for milling purposes which will be caused by now shutting up the lower coop may be set off against the loss of water which would be caused by the aperture now partly filled up by the upper coop being made clear of its present obstruction. Therefore, in our view of the law, part of the proper judgment in this case would be to accept the shutting up of the lower coop, so as to make it part of the solid mill-weir; for, if the upper coop and all fishing apparatus there were cleared away from the present aperture at the upper coops, this would enable the correct balance of water-flow to be left in favour of the mills, and no injury would be done to the milling-power, since the extent of milling easement hitherto acquired does not include more water than would be under that alteration supplied.

104. *Decision.* But, even if we had come to the conclusion that the coops were entirely legal, there would still remain the question whether in any view the weir-hecks could be justified. These hecks in their present state inflict a wanton injury by killing large numbers of spent fish which would otherwise help to maintain the stock, and they also prevent the fish jumping over the weir. As

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Coke says, "Salmon is victual, and what is more precious than victual?" Now, that that is worth the protection of law, is implied by Coke. It would also follow that nothing can be claimed as an appurtenance to an easement, which is not necessary to the reasonable enjoyment of that easement. Here, the weir-hecks are not an essential part of the easement of a fishing-weir, even if it be assumed that a fishing-weir is an easement; and therefore, even in the most favourable view of this case, we could not be justified in permitting these weir-hecks to be continued in connection therewith. If a bridge is necessary for the use of the coops, then it must be made in such a way as not to intercept the spent fish, and must be kept at a distance from the top of the dam, so that fish may either go up or come down over the weir without unnecessary impediment.

The Court of Queen's Bench having, as already stated, laid down a contrary rule to what we should otherwise act upon, we are in this difficulty. The legislature has provided for an appeal being brought against any of our orders, to either of the three superior courts of common law; but no further appeal is provided from the decision of whichever of these three courts may be selected. Hence, the judgment of such superior court is final, and concludes the parties. Now, the principles and authorities we have so fully entered into lead us to the conclusion that these coops are entirely illegal. But, if we were to decide according to our view of the law, the owner would no doubt appeal (and no one could complain of his doing so) to the Court of Queen's Bench, when that Court would probably say it had already decided the point in *Rolle* v. *Whyte* (Law Rep. 3 Q. B. 286), and might, according to the usual practice, decline to re-open the question or hear further argument, and so reverse our judgment; and thereby the rights of the upper riparian owners would be concluded for ever. If, on the other hand, we decided in opposition to our own view of the law, and in deference to the authority of the Court of Queen's Bench, which we are bound to do, whatever may be our own opinion, then this consequence will follow, that the riparian owners will not be concluded, but will have it in their power to appeal against our order, not to the Court of Queen's Bench, but to one of the other two superior courts. Though we feel bound by the authority of *Rolle* v. *Whyte*, as decided by the Court of Queen's Bench, either of the other two superior courts would not be bound by that authority, but would hear the arguments and judge for itself, and thus enable this case to be reviewed for the satisfaction of the riparian owners of the kingdom, whose interests are so largely involved in the question. These considerations, therefore, point out the proper course for us to follow. We will make our order that the coop in its present state is legal, subject to the bed of the pass being made level with the bed of the river, the alterations to be made to our satisfaction, and further subject to the weir-hecks being wholly removed, or at least removed so far from the top of the dam as not to interfere with the passage of the fish over the top of the dam. The sum of the whole, therefore, is, that, for the reasons stated, and in the peculiar circumstances in which the decision of the Court of Queen's Bench and the statutes place us, notwithstanding we are clearly of opinion that the riparian owners who oppose this coop are entirely right, we must decide against them.

June 2. *Holker, Q.C.* (*Fawcett* with him), for the appellants, contended that the respondent's coop was illegal. He relied on the

reasons stated at length by the commissioners in their judgment, and in particular on the statutes Magna Charta, c. 23, 17 Ric. 2, c. 9 (which was not referred to in the case of *Rolle* v. *Whyte* (1)), 12 Edw. 4, c. 7, and 1 Geo. 1, st. 2, c. 18, and on the document of 6 & 7 Edw. 1 (2), which he contended was a local Act though not appearing in the published statutes. He cited Viner's Abridgment, Nuisance, E. 3, to shew that the coop was a nuisance; and *Mounsey* v. *Ismay* (3), to shew that the right to the coop could not be claimed under the Prescription Act, 2 & 3 Wm. 4, c. 71.

Mellish, Q.C. (*Manisty, Q.C.*, and *Kemplay* with him), for the respondent. This is, in effect, an appeal from the decision of the Court of Queen's Bench, in *Rolle* v. *Whyte* (1), and though this Court may not be in strictness bound by that decision, as there is no appeal in these cases, yet the inconvenience if the two Courts differ will be very great, since whichever way the commissioners decide the party decided against will then always be able to reverse the decision by appealing to the appropriate Court. Several questions have been reserved for the Court, but the real question to be decided in this case is, whether the coop in question was itself legal and the respondent entitled to it; it must, no doubt, be assumed, as the commissioners have so found that the coop is of modern origin, and that the river is not navigable.

First, then, do any of the statutes that have been referred to render such a coop illegal in a river which is not navigable?

The statutes referred to by the commissioners in their judgment may be divided into two classes, those relating to salmon and fixing the close season, &c., and those which relate to navigation and provide for the abating of weirs, &c., and in the latter, salmon are not expressly mentioned. These latter statutes cannot apply to all rivers, for if so a person who owned the whole of a non-navigable river could not erect a weir in it, though he would thereby injure no one.

The first statute on the subject is Magna Charta, which, although perfectly general in its terms, is limited to navigable rivers: Callis on Sewers, p. 258; Coke, 2 Inst. p. 38; *Chester Mill Case.* (4)

(1) Law Rep. 3 Q. B. 286.
(2) Antè commissioners' judgment, par. 57, p. 691.
(3) 3 H. & C. 486; 34 L. J. (Ex.) 52.
(4) 10 Co. Rep. 138.

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The only authorities to the contrary are the recital of 12 Edw. 4, c. 7, passed 250 years after, and a dictum in *Weld* v. *Hornby*. (1) 12 Edw. 4, c. 7, however, only speaks of the provisions of Magna Charta respecting rivers as being for the protection of the fry of fish spawned within the same, which may well have meant within the navigable parts, since salmon are not mentioned, and the protection of fish in the public fisheries would naturally be a subject for legislation; and in *Weld* v. *Hornby* (1) the fact that the weir was in a part of the river which was not navigable, which has been now ascertained by the commissioners, does not seem to to have been adverted to, as it is not stated in either of the reports (2), and in the report in Smith the Act, 1 Geo. 1, stat. 2, c. 18, which has special reference to the Ribble, is said to have been referred to by Lord Ellenborough, and that therefore may have been the ground of his judgment. The next statute, 25 Edw. 3, c. 4, is almost in terms confined to navigable rivers, and 43 Edw. 3, c. 2, seems to be clearly so also.

The 17 Ric. 2, c. 9, which is specially relied on by the appellants, appears to have been intended to prevent fishing weirs being so constructed as to destroy the young fish, and provides that the openings should be wide enough to allow them to pass through; it has no reference at all to the taking of full-grown fish, and the translation of it given by the commissioners in their judgment, par. 27, cannot be sustained.

The Scotch Acts afford no real guide to the interpretation of this statute, because in Scotland the salmon was a royal fish, and there were special grounds, therefore, for its legislative protection.

The 12 Edw. 4, c. 7, was carefully considered by the Court of Queen's Bench in *Rolle* v. *Whyte* (3), and the reasons there given for holding it to refer only to navigable rivers, are quite satisfactory.

The statute, 1 Geo. 1, stat. 2, c. 18, certainly refers to the river Derwent, in Yorkshire, and is evidence, at most, only of the previous state of the law in that county, and not throughout the kingdom. The respondent, on the contrary, relies on the Solway Fisheries Acts, 44 Geo. 3, c. xlv., 49 Geo. 3, c. ii.; which, if not

(1) 7 East, 195; 3 Smith, 244. (2) 7 East, 195; 3 Smith 244.
(3) Law Rep. 3 Q. B. 286.

sufficient to legalize the weir, if prohibited by the previous statutes, afford strong evidence that such weirs were not necessarily a nuisance, and prevent the non-compliance with the provisions of 17 Ric. 2, c. 9, at all affecting the question. No weight can be given to the documents relied on by the appellants, which, at most, are only evidence of local customs. That of 6 & 7 Edw. 1, referred to in par. 57 of the commissioners' judgment, is certainly not a statute, since it is found in no authorized collection, whatever its exact nature may be.

The weir then being legal, may be claimed by prescription at common law or under the Prescription Act (2 & 3 Wm. 4, c. 71); the fact that the word "prescription" is not used by the Salmon Fishery Act, 1861 (24 & 25 Vict. c. 109, s. 12), with respect to the rights to be preserved, can make no difference, as was decided in *Rolle* v. *Whyte*. (1) Even if the right to this weir cannot be gained under the Prescription Act or under the special facts of this case by immemorial usage, yet the weir was lawfully in use within the meaning of s. 12 of the Salmon Fishery Act, 1861, as there was evidence on which the commissioners ought to have found a lost grant. The respondent's title to the coop was therefore a legal right and fully established.

Holker, Q.C., in reply.

Cur. adv. vult.

July 16. The judgment of the Court (Bovill, C.J., and Willes and Montague Smith, JJ.) was delivered by

BOVILL, C.J. The fishery commissioners made an order declaring the legality (subject to certain conditions) of a fishing coop or box to which Lord Lonsdale claimed to be entitled in a mill-dam across the river Derwent, in Cumberland; and this was an appeal against the order. The decision was given by the commissioners contrary to their own opinion, in deference to the judgment of the Court of Queen's Bench in the case of *Rolle* v. *Whyte* (1); and they at the same time delivered very able and elaborate reasons to shew why in their judgment their decision should have been the reverse of that which they pronounced. The present appeal was brought principally for the purpose of taking the opinion of this Court as to

(1) Law Rep. 3 Q. B. 286.

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the propriety of the decision pronounced by the Court of Queen's Bench. As we agree in that decision, it is unnecessary to consider (though the question is a grave one) how far it would have been proper, having regard to the peculiar machinery of the appeal clause under which the case comes before us, to act upon a contrary opinion, had we arrived at one.

The first question which arises is, whether the provisions of Magna Charta and the other early statutes which were relied upon as prohibiting weirs were confined to navigable rivers; and that point was elaborately argued before us, and is discussed at large by the fishery commissioners in their judgment. We have carefully considered this point, and concur in the opinion expressed by the Court of Queen's Bench, that these statutes relate to navigable rivers only, and for the reasons which are fully stated in the judgment in the Court of Queen's Bench, and which it is therefore unnecessary to repeat. In addition to the passage cited from Callis on Sewers (1), which the Court of Queen's Bench considered of great weight, there is the higher and weightier authority of Lord Coke, citing a passage from Glanville in the 2nd Institute, referred to in the course of the argument, to shew that the enactment of Magna Charta applied only to public rivers. If it were otherwise, there would have been a prohibition against erecting weirs in all private rivers, even where a person was the owner of the entire river and of the land on both banks, which, we think, could not have been intended. The record of 6 & 7 Edw. 1, at par. 23 (2) of the case, seems also very strongly to shew that at that time the enactment of Magna Charta was not considered to have the effect which is now contended for by the appellants. We think it may also be collected from the observations of Lord Hale in his treatise de Jure Maris, cc. 3 and 5, that his view of the early statutes was the same as Lord Coke and Callis took of them.

We may mention that the record of 6 & 7 Edw. 1 to which we have just referred, and which is spoken of as a local statute for Cumberland in the case, both from its intrinsic character and by reference to the roll appears to be only a record of proceedings

(1) Page 259; 4th ed. 307.

(2) See antè commissioners' judgment, par. 57, p. 691.

before John de Vallibus and others, justices in eyre, and not a "local Act."

With respect to the statute of Geo. 1 (1), assuming it could alter the case, there is nothing to shew that the river therein mentioned is the Derwent under consideration. On the contrary, whether the selection is made, par excellence, of the rivers mentioned in Walton, part 1, c. 19; part 2, c. 2, or according to the rule noscitur a sociis, as insisted upon in argument, the Derwent in the statute of Geo. 1 is a Derwent contributory to the Humber. The mode and order in which the other rivers are named in the Act, according to the ordinary rules of construction, exclude the application of it to this river.

The Solway Acts (2) were referred to in the course of the argument. But it seems to us that they do not affect the present question; that the last Act merely regulated the close season and size and shape of the hecks and meshes; and that it cannot be construed to make this coop legal if it was otherwise illegal at the time of the passing of that Act, nor render the entire coop illegal merely because the hecks may have been used contrary to its provisions, so as that penalties were incurred.

The weir in this case was in a part of the river above the flow of the tide, and where it was not navigable; and we are of opinion that the use of the weir is not shewn to have been unlawful by force of any statute at the time of the passing of the Salmon Fishery Act, in 1861. It was contended that, independently of any statute, the erecting a coop of the present description, without any gap or opening in the dam to allow fish to pass, was a public nuisance; but we see no ground for saying that a coop which is not in a public navigable river can be treated as a nuisance. The supposed authorities which were cited do not appear to us to make out any such proposition; and the passage in the 2nd Institute involves the contrary. The case of *Weld* v. *Hornby* (3), which was relied upon on this point, did not raise any such question. It was an action for a private nuisance, and unquestionably maintainable in respect of the plaintiff's private right of property, which was injured by the act of the defendant in making his weir more

(1) 1 Geo. 1, st. 2, c. 18. (2) 44 Geo. 3, c. xlv.; 49 Geo. 3, c. ii.
(3) 7 East, 195; 3 Smith, 244.

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impervious to fish, and so preventing them from arriving at the plaintiff's fishery, a grievance long recognized as giving a right of action, independent of any question of public nuisance; see the precedent in the last case of year 46, Lib. As. The dictum of Lord Ellenborough must be read as assuming that the river was public; and the marginal note to the report of the case in 3 Smith, 244, expressly refers to it as a public river. Its turning out upon inquiry not to be so in fact at the point where the weir actually was, only shews that Lord Ellenborough was mistaken as to the fact, or that his attention was not at the moment directed to its importance. The dictum was unnecessary to the decision of the case, and is outweighed by the authority of Coke and Glanville. At the same time, it is proper to observe that the opinion thus extrajudicially thrown out has led to much misapprehension, which even the judgment of the Court of Queen's Bench in *Rolle* v. *Whyte* (1), does not appear to have quite corrected. The passage cited from Viner's Abridgment, tit. Nuisance, 3, was clearly also a case of injury to a private right.

It was further contended that a claim to a coop of this description was not within the Prescription Act; and that this coop, having been erected since 1741, and therefore not having existed from time immemorial, could not be lawful. If it had been necessary to decide that question, strong arguments were presented to us in support of the conclusion that such a claim is within the Prescription Act, in accordance with the judgment of the Queen's Bench in *Rolle* v. *Whyte* (1); but it is unnecessary to determine that point, because we are of opinion that this coop can be considered as *lawfully in use* at the time of the passing of the Salmon Fishery Act, 1861, *by virtue of a grant*, within the meaning of s. 12 of that Act. A grant may be proved either by production of the grant itself or by evidence of enjoyment consistent only with the existence of such a grant, and from which it may be presumed; and there is abundant evidence in this case, by an enjoyment for sixty years and as far back as living memory extends, of the coop being used in substantially the same manner as it was used in 1861, to shew that the commissioners might and ought to find that the right did exist by grant from all the proprietors whose interests could be

(1) Law Rep. 3 Q. B. 286.

affected by the coop. The case of *Weld* v. *Hornby* (1), and the ruling of Lord Manners at the trial of the case, were quite in accordance with this view.

For these reasons, we think the commissioners were right, upon the facts found in the case, in making the order that this coop was legal, and that our judgment should be in favour of the respondent. As, however, the appeal was brought at the suggestion of the commissioners, we think there should be no costs.

Appeal dismissed.

Attorneys for appellants: *Jennings, White, & Buckstone, for Messrs. Saul, Carlisle.*

Attorneys for respondent: *Gregory, Rowcliffes, & Rawle, for W. Lumb, Whitehaven.*

[IN THE EXCHEQUER CHAMBER.]

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June 22.

Will—Evidence—Latent Ambiguity—Extrinsic Evidence—"Nephew."

Testator devised property to "my nephew Joseph Grant." It appeared that the testator's brother had a son named Joseph Grant, and that the brother of the testator's wife also had a son of the same name:—

Held (affirming the judgment of the Court of Common Pleas), that the description "my nephew" was applicable to both Joseph Grants, and that a latent ambiguity was therefore disclosed, and consequently that parol evidence was admissible to shew which Joseph Grant was meant by the testator.

ERROR from the judgment of the Court of Common Pleas in favour of the defendant. (2)

June 22. *Quain, Q.C.* (*Grove Chapman* with him), for the plaintiff. If the evidence set out in the special case was admissible, there can be no doubt that the testator intended to give the estate in question to the defendant. In construing a will, however, the Courts will adhere to general rules of interpretation,

(1) 7 East, 195; 3 Smith, 244.

(2) Antè, p. 380. This case had also been decided by Lord Penzance (Law Rep. 2 P. & D. 8), whose decision was the same as that of the Court of Common Pleas.

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rather than look for the particular intention in each individual case: per Tindal, C.J., in *Doe* d. *Clarke* v. *Ludlam*. (1) Where the language of the will is such that it may refer to either of two persons or two subject-matters, parol evidence is admissible to shew which person or thing the testator intended: but, where one of them completely answers to and completely fills up the description in the will, in its ordinary and strict meaning, parol evidence is not admissible to shew that the testator meant something else. "In expounding a will, the Court is to ascertain, not what the testator actually intended, as contradistinguished from what his words express, but what is the meaning of the words he has used:' per Parke, B., in *Doe* d. *Gwillim* v. *Gwillim*. (2) In *Rickman* v. *Carstairs* (3), Lord Denman applies the same doctrine to the construction of a policy of insurance. The rule is similarly laid down by Lord Wensleydale in *Grey* v. *Pearson*. (4) And it is consistent with Propositions 1, 2, 3, 7, of Wigram on Extrinsic Evidence. (5)

[BLACKBURN, J., referred to Blackburn's Contract of Sale, p. 49, where the rule upon this subject is thus stated:—"The general rule seems to be, that all facts are admissible which tend to shew the sense the words bear with reference to the surrounding circumstances of and concerning which the words were used, but that such facts as only tend to shew that the writer intended to use words bearing a particular sense are to be rejected." To this at p. 50 is added the following note:—"The principles of the rules of law regulating the admissibility of extrinsic evidence to aid the construction of wills and of contracts required to be in writing, seem to be the same. But, in applying them, it seems necessary to bear in mind that there is a distinction between the two classes of instruments. The will is the language of the testator, soliloquizing, if one may use the phrase, and the Court in construing his language may properly take into account all that he knew at the time, in order to see in what sense the words were used. But the language used in a contract is the language used to *another* in the course of an isolated transaction, and the words must take their meaning from those things of and concerning which they are used, and

(1) 7 Bing. 275, 279.
(2) 5 B. & Ad. 122, 129.
(3) 5 B. & Ad. 651, 663.
(4) 6 H. L. 61, 106.
(5) 3rd ed. pp. 15, 17, 42.

those only. This does not affect the law, but it is of some consequence in the application of it, as it narrows the field of inquiry." No authority is referred to for the proposition; but such was then my opinion, and I still think the same.]

There is nothing in the context here to shew that the testator used the expression "my nephew Joseph Grant" in any other than its strict primary sense. The authorities are numerous to shew that the construction of a will on the face of it free from ambiguity is not to be influenced by parol evidence of actual intention: *Beaumont* v. *Fell* (1); *Doe* d. *Chichester* v. *Oxenham* (2); *Doe* d. *Gord* v. *Needs* (3); *Doe* d. *Hiscocks* v. *Hiscocks* (4); *Mounsey* v. *Blamire* (5); *Miller* v. *Travers* (6); *Doe* d. *Ashforth* v. *Bower*. (7) None of the parol evidence here was admissible.

Wills (*Field, Q.C.*, with him), contrà, was not called upon.

KELLY, C.B. I am of opinion that the judgment of the Court of Common Pleas should be affirmed. The testator by his will has made a devise in these terms:—"I bequeath to my nephew Joseph Grant the sum of 500*l.*, and all the stock and household effects in the house where I now live; and I devise to my said nephew Joseph Grant, his heirs and assigns, the said house and premises where I now live." Then in a codicil he expresses himself thus, after referring to the will,—"I appoint my nephew James Grant an executor of my said will, in conjunction with my nephew Joseph Grant; and I devise all estates vested in me as trustee or mortgagee unto the said Joseph Grant and James Grant, their heirs and assigns, subject to the equities affecting the same." An action of ejectment being brought to recover the land in question, the defendant appears to defend; and the case stands thus:—There are two persons in existence to whom the description in the will "my nephew Joseph Grant" might properly be applied; and accordingly evidence is entered into to which for the purpose of raising the question I see no objection. That evidence in substance amounts to this, that, at the time of his death, the testator

(1) 2 P. Wms. 141.
(2) 3 Taunt. 147.
(3) 2 M. & W. 129.
(4) 5 M. & W. 363.
(5) 4 Russ. 384.
(6) 8 Bing. 244.
(7) 3 B. & Ad. 453.

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had a brother William who had a son named Joseph; and that the testator's wife also had a brother who had a son named Joseph Grant: so that there were two persons either of whom might in a certain sense come within the terms of the will; and the question is to which of the two the testator intended to leave the property. No doubt this is a latent ambiguity; and, on its appearing that there are two persons who in different senses and different meanings of the word were nephews of the testator, the question is whether evidence is admissible, and to what extent, to shew which of them the testator meant. It is impossible to deny, without reference to more than our own knowledge of the English language and the sense in which words are ordinarily used, that each of these persons may without doing any violence to the language of the will, come within the description. It is true that perhaps the more strict and accurate meaning of "nephew" is, a brother's or a sister's son. But we all know that it is as commonly used to describe the son of a wife's brother or sister. When, therefore, we find a word thus susceptible of two meanings, is it not competent to us to enter into evidence to see what the testator really did intend? Many cases have been referred to for the purpose of shewing that, where the language of a will may have effective operation without any extrinsic evidence to explain it, such evidence is inadmissible; as in *Doe* d. *Chichester* v. *Oxenham* (1), where the devise was of "my estate of Ashton," and, the testator having a maternal estate comprehending a manor and capital farm and lands in the parish of Ashton, as well as several other estates, some in the adjacent parishes, some ten and fifteen miles distant, it was held that evidence was not admissible to shew that he was accustomed to call all his maternal estate his Ashton estate, to raise the inference that he meant to devise the whole by that name. My estate of Ashton may very well mean my estate in the parish of Ashton, and may be altogether inapplicable to any estate in another parish. But, when we come to consider who was intended by the testator when he spoke of his "nephew Joseph Grant," and the Court has to determine which of two persons bearing the same name, and standing in the same relation in a popular sense to the testator, is the person intended, extrinsic evidence must be resorted

(1) 3 Taunt. 147.

to for that purpose. Sir James Wigram in his Treatise on Extrinsic Evidence, § 184, referring to *Miller* v. *Travers* (1), *Doe* d. *Gord* v. *Needs* (2), and *Hiscocks* v. *Hiscocks* (3), says: "From these judgments it will appear that the decisions have affirmed the doctrine that, where the description in the will of the *person* or *thing* intended is applicable with legal certainty to each of several subjects, extrinsic evidence is admissible to prove which of such subjects was intended by the testator." It is impossible to deny that "nephew" may with legal certainty be applicable either to the son of a brother or sister, or to the son of the wife's brother or sister. The consequence is that we are obliged to have recourse to the extrinsic evidence, so far as by the rules of law it is admissible, in order to see which of the two persons who fulfil the description was the person intended. The whole of the evidence here is objected to as inadmissible. It is impossible to reject evidence of the relation in which the plaintiff and defendant respectively stood to the testator; and, when we have the two before us, what is to determine us as to which of them the description applies to. I at once pass over the evidence set forth in paragraphs 18 and 19. (4) I am far from wishing to throw a doubt upon its admissibility; but I do not think, sitting here as a Court of Appeal, we ought unnecessarily to decide a question which may be open to some doubt. But, when we look at paragraphs 16 and 17, and especially at the latter, I cannot entertain a doubt that that evidence is admissible. It appears that the plaintiff was the son of the testator's brother William, of whose name and existence the testator was ignorant at the time he made his will; and that, on the other hand, the defendant, the son of his wife's brother, had been brought up by the testator as a member of his family, and assisted him in the management of his business. The defendant had long been the object of the testator's affection and regard. Under these circumstances, we are called upon to exclude this, the only evidence which could be given to shew which of the two the testator meant by his nephew Joseph Grant, on the ground that the two were not equally in a strict legal sense nephews of the testator. I see no authority for saying that there must be an absolute equality in the applicability of a

(1) 8 Bing. 244.
(2) 2 M. & W. 129.
(3) 5 M. & W. 363.
(4) Antè, p. 383.

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description before extrinsic evidence can be let in. On the contrary, I find abundance of authority that, if the description applies with legal certainty to more than one person, such evidence is admissible. Reading the will with the aid of that evidence which I conceive to be beyond all question admissible, I entertain no doubt whatever that the defendant was the object of the testator's bounty, and comes strictly within the description in the will. For these reasons, I think the judgment of the Court of Common Pleas should be affirmed.

MARTIN, B. I am of the same opinion. The devise which we are called upon to construe is in these terms:—"I devise to my nephew Joseph Grant, his heirs and assigns, the house and premises where I now live." In itself the language of that devise is clear and plain. The difficulty, if there be one, arises from the fact of there being two persons of the name of Joseph Grant who stood in the relation of nephew to the testator, one being the son of his brother, the other the son of his wife's brother. Both are in common understanding and according to ordinary experience treated as nephews. That being so, what is the rule of law? The distinction between a latent ambiguity and a patent ambiguity is well put in Starkie on Evidence, 3rd ed. vol. 3, p. 755 (1): "An important distinction has already been adverted to between ambiguities which are *apparent* on the face of an instrument, and those which arise merely extrinsically in the *application* of an instrument of clear and definite intrinsic meaning to doubtful subject-matter. An ambiguity apparent on reading an instrument is termed ambiguitas patens; that which arises merely upon its application, ambiguitas latens. The general rule of law is, that the latter species of ambiguity may be removed by means of parol evidence, the maxim being, 'Ambiguitas verborum latens verificatione suppletur; nam quod ex facto oritur ambiguum verificatione facti tollitur.' On the other hand, it is a settled rule that such evidence is inadmissible to explain an ambiguity *apparent* on the face of the instrument." Afterwards, at p. 768, he says (2): "In the next place, it is always necessarily a matter of extrinsic evidence to *apply* the terms of an instrument to a particular sub-

(1) 4th ed. p. 652. (2) 4th ed. p. 679.

ject-matter the existence of which is also matter of proof. A difficulty in this case occurs, where, although the terms of the instrument be sufficiently definite and distinct, the objects to which it is to be applied are not equally so, and where it is doubtful whether the description applies at all to the particular object pointed out by the evidence, or whether it is not equally applicable to several distinct objects." He goes on to give an instance which is identical with the present case: "The general rule has already been adverted to, that a latent ambiguity (that is, an ambiguity arising from extrinsic evidence,) may be removed by extrinsic evidence. The illustration most usually given of the operation of this rule is that of a description in a will of a devisee, or of an estate, where it turns out that there are two persons, or two estates, of the same name and description. Where the testatrix devised an estate to John Cluer, and there were two persons, father and son, of that name, evidence was admitted to shew that John Cluer the son was meant:" *Jones* v. *Newman.* (1) He also refers to *Lord Cheney's Case.* (2) Here is a latent ambiguity when it appears that there are two persons who answer the description of "my nephew Joseph Grant." Extrinsic evidence is clearly admissible to shew which nephew the testator meant. The evidence shews that the testator knew neither the name nor the existence of the plaintiff; but that he had adopted the defendant at a very early age, brought him up as a member of his family, and had long had his services in the management of his business. In the teeth of this evidence, we are asked to give judgment in favour of a man who clearly was never intended to be the object of the testator's bounty. I think we ought not to do so.

CHANNELL, B. I am clearly of opinion that both the judgment of Lord Penzance (3) and that of the Court of Common Pleas (4) were right. As three Courts are now unanimous in this view, it is to be hoped that there will be an end of this litigation.

BLACKBURN, J. I also am of opinion that the judgment of the

(1) 1 W. Bla. 60.
(2) 5 Co. Rep. 58. b.
(3) Law Rep. 2 P. & D. 8.
(4) Antè, p. 380.

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Court of Common Pleas should be affirmed. I entirely agree with my Brother Martin that there can be no moral doubt of the propriety of the decision: but I come to the conclusion that the plaintiff is not entitled to recover, according to the rules of law. I would point out in a few words what I conceive to be the ground of the plaintiff's claim. Mr. Quain very properly admitted that the evidence set out in the case, if admissible, was conclusive against him: but he relied upon the fact of the written will leaving the property unambiguously to the testator's nephew Joseph Grant, and he insisted that no evidence was admissible to shew that the testator meant his wife's nephew Joseph Grant. The only authority he quoted for that was the second proposition in Sir James Wigram's work on Extrinsic Evidence. All the rest has no application whatever. That proposition is as follows:—"Where there is nothing in the context of a will from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, and where his words so interpreted are *sensible with reference to extrinsic circumstances*, it is an inflexible rule of construction that the words of the will shall be interpreted in their strict and primary sense, and in no other, although they may be capable of some popular or secondary interpretation, and although the most conclusive evidence of intention to use them in such popular or secondary sense be tendered." Reading that proposition with reference to the Introductory Observations at pp. 7-9, the phrase "evidence of intention" expresses exactly the opinion which I have always entertained upon this subject. "The question in expounding a will," he says, "is, not what the testator meant, as distinguished from what his words express, but simply what is the meaning of his words. And extrinsic evidence in aid of the exposition of his will must be admissible or inadmissible with reference to its bearing upon the issue which this question raises." The facts disclosed by the evidence set out in paragraphs 15, 16, and 17 of the special case, are abundantly sufficient to satisfy any rational person that the testator intended to leave the estate to his wife's nephew. But Mr. Quain insists that it is an inflexible principle of law that, if the words of a will have a strict primary sense, evidence is not admissible to shew that the testator meant to use them in any

other sense; and that here "nephew," in its strict primary sense, importing the son of a brother or sister, it was not competent to the defendant to shew that the testator intended his wife's nephew. Most if not all the cases cited by Mr. Quain where extrinsic evidence was rejected were cases where it was offered for the purpose of shewing what was the intention of the testator. In *Miller* v. *Travers* (1), the devise was of all the testator's freehold estates in the county of Limerick, and in the city and county of the city of Limerick. The testator had no estates in the county of Limerick, but a small estate in the city of Limerick inadequate to meet the charges in the will, and estates in the county of Clare not mentioned in the will. And it was held that the devisee could not be allowed to shew by parol evidence that the estates in the county of Clare were devised to him in the draft of the will, that the draft was sent to a conveyancer to make certain alterations not affecting the estates in the county of Clare, that he by mistake erased the words "county of Clare," and that the testator, after keeping the altered will by him for some time, executed it without adverting to the alteration as to the county of Clare. There, proof of the mistake would be evidence of intention, and therefore properly rejected. There is another case in the House of Lords to the same effect, namely, *Langston* v. *Langston*. (2) There the testator devised his manors, &c., to trustees upon trust to convey the same to the use of I. H. L. (his eldest son) for life, with remainder to the use of the *second*, third, and *all and every other* the son and sons of the body of I. H. L. severally and successively, &c., in tail male, remainder to the use of the devisor's second and other sons successively, &c. The Vice Chancellor (Sir John Leach), after having sent cases for the opinions of the Courts of Queen's Bench (3) and Common Pleas (4), held, in conformity with the opinion of the last-mentioned Court, that, from the whole tenor of the will, the *first* son of I. H. L. was entitled to have an estate-tail in the demised manors, expectant on the death of his father, limited to him in the conveyance directed to be made to the trustees: and that decree was affirmed by the House of Lords. It appeared in

(1) 8 Bing. 244.
(2) 8 Bli. 167; 2 Cl. & F. 194.
(3) *Langston* v. *Pole*, 9 D. & R. 298.
(4) *Langston* v. *Pole*, 5 Bing. 228.

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the course of the argument (1) of that case in the House of Lords that a mistake had occurred in the engrossment of the will, the copying-clerk having omitted an entire line in the draft; and I have always entertained a notion that the sight of the draft had something to do with the decision. *Doe* d. *Gord* v. *Needs* (2) introduces another principle, which is this, that if, after having got the explanatory evidence, the will would be void for uncertainty, there evidence of intention may be given to solve the ambiguity. *Doe* d. *Hiscocks* v. *Hiscocks* (3) is another example of that. Lord Abinger, in delivering the judgment of the Court, there says (4): "There is but one case in which it appears to us that this sort of evidence of intention can properly be admitted, and that is where the meaning of the testator's words is neither ambiguous nor obscure, and where the devise is on the face of it perfect and intelligible; but, from some of the circumstances admitted in proof, an ambiguity arises as to which of the two or more things, or which of the two or more persons (each answering the words in the will), the testator intended to express. Thus, if a testator devises his manor of S. to A. B., and has two manors of North S. and South S., it being clear he means to devise one only, whereas both are equally denoted by the words he has used, in that case there is what Lord Bacon (5) calls 'an equivocation,' i. e. the words equally apply to either manor, and evidence of previous intention may be received to solve this latent ambiguity; for the intention shews what he meant to do; and, when you know that, you immediately perceive that he has done it by the general words he has used, which, in their ordinary sense, may properly bear that construction." In *Doe* d. *Hiscocks* v. *Hiscocks* (3), evidence of intention was rejected because no proper case was made for its reception: in *Doe* d. *Gord* v. *Needs* (2) the evidence was admitted, and properly admitted, for the reason already stated. So, in *Doe* d. *Oxenham* v. *Chichester* (6), the evidence which was rejected was evidence of intention, in the sense in which that term is used by Sir James Wigram. Apart from the facts set out in par. 18 (7) (upon which

(1) See Lord Brougham's judgment, 2 Cl. & F. at p. 240.
(2) 2 M. & W. 129.
(3) 5 M. & W. 363.
(4) 5 M. & W. at p. 368.
(5) Bacon's Maxims, 25.
(6) 4 Dow, 65.
(7) Antè p. 383.

the Court below place some reliance) and those set out in par. 19, as to the admissibility of which I entertain some doubt, as at present advised, there was ample explanatory evidence to warrant the judgment of the Court below. I therefore agree with the rest of the Court in thinking that the judgment should be affirmed.

MELLOR, J. I am of the same opinion. I am content to rest my judgment upon the passage read by the Lord Chief Baron from Sir James Wigram's excellent treatise, which seems to me to lay down a clear and sound rule of law. As was said by Parke, B., in *Doe* d. *Gord* v. *Needs* (1), "the evidence of the declarations of the testator has not the effect of varying the instrument in any way whatever; it only enables the Court to reject one of the subjects or objects to which the description in the will applies, and to determine which of the two the devisor understood to be signified by the description which he used in the will." That appears to me to be consistent equally with plain sense and law.

CLEASBY, B. It appears that the testator had a nephew Joseph Grant, who was the son of his deceased brother. It so happened that his wife also had a nephew whose name was Joseph Grant. By his will the testator bequeathed to his "nephew Joseph Grant" 500*l.* and all the stock and household effects in the house where he then lived; and then he proceeds, "and I devise to my said nephew Joseph Grant, his heirs and assigns, the said house and premises where I now live;" and he appoints his said nephew Joseph Grant his executor. If there had been no other person in existence besides the plaintiff, the son of the testator's deceased brother, who answered to the description of "my nephew Joseph Grant," the property would unquestionably have gone to him. But, when it appeared that there were two persons who answered to that description, the one the son of the testator's brother, the other the son of his wife's brother, a latent ambiguity was disclosed, to solve which it became necessary to resort to extraneous evidence. I agree with the rest of the Court that there was abundant extrinsic evidence, which was clearly admissible, to shew that the

(1) 2 M. & W. 129, 140.

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wife's nephew,—the only person known to him who answered to the description of "my nephew Joseph Grant,"—was the object of the testator's bounty.

Judgment affirmed.

Attorney for plaintiff: *F. T. Dubois.*

Attorneys for defendant: *Fuller & Saltwell, for F. Fuller, Rugby.*

June 16.

INMAN AND OTHERS *v.* JENKINS.

Interrogatories—Libel—Questions tending to criminate the Person interrogated—Special circumstances—Discretion of Judge at Chambers.

10 C B 224-5, 241 20 L J C P 526

To an action for libel, in sending to the *Times* newspaper a libellous extract from a letter, the defendant pleaded the general issue and a justification, a judge at Chambers, upon the usual affidavit, allowed the plaintiffs to administer to the defendant the following interrogatory: "Did you write and send to the *Times*, for publication, a letter signed Z., accompanied by what purported to be an extract from the letter from a Halifax merchant?" The defendant had obtained a commission to Nova Scotia to examine witnesses upon an affidavit which stated that the extract was from a letter he had received from a person in Nova Scotia with whom he had since communicated, and on whose information, believing the statement to be true, he had pleaded a justification, in support of which it was necessary to examine witnesses in Nova Scotia. This affidavit was not before the judge, but it did not appear whether the facts had or had not been stated to him. On a motion to set aside the order allowing the interrogatory:—

Held, that whether such an interrogatory should be allowed or not was a matter for the discretion of the judge, with which the Court would not interfere unless he was shewn to have been clearly wrong; and that though some special circumstances should be shewn to the judge before he would be justified in allowing such an interrogatory, yet the circumstances in the present case appeared to be sufficiently special, and were, at any rate, not shewn not to be so.

THIS was a rule to set aside an order of Blackburn, J., allowing the plaintiffs to put to the defendant the following interrogatory: "Did you, on or about the 10th of March, 1870, write and send to the *Times*, for publication, a letter signed Z., accompanied by what purported to be an extract from the letter from a Halifax merchant?"(1)

The action was for libel in sending to the *Times*, for publication, a letter containing an extract from a letter from Nova

(1) There were other interrogatories of a similar nature which were also objected to and allowed; but nothing turned upon their form.

Scotia, accusing the plaintiffs of improperly overloading a passenger steamer which had consequently been lost: the defendant had pleaded not guilty and a justification. The order had been made on an affidavit in the usual form, which stated the nature of the pleadings, and that the plaintiffs believed that the defendant still had in his possession the letter from which the extract was made, but did not state any other special circumstances. The defendant had obtained a commission to examine witnesses in Nova Scotia on an affidavit which contained the following paragraphs:—

"7. The alleged libel consists of an extract from a letter which I received from a merchant residing at Halifax, Nova Scotia, and with whom I have since communicated on the subject, and from information given by him, and believing the same to be true, I have pleaded a justification of the alleged libel; and he informs me, and I believe it to be true, that there are numerous witnesses at Halifax who can testify to the truth of the alleged libel, but who may not be disposed to attend before a commissioner voluntarily to give evidence thereof; and I am therefore afraid, and am advised and believe, that unless a mandatory commission is granted by this honourable Court to take their evidence at Halifax aforesaid, there may be a miscarriage of justice.

"8. I have applied to the Board of Trade to institute a public inquiry into the facts concerning the loss of the *City of Boston* and the lives of the 200 individuals who were on board of her; and I have also offered to the plaintiffs to give up the name of my correspondent at Halifax from whom I received the information, the subject of the alleged libel, with a view to the inquiry taking place at Halifax aforesaid."

This affidavit was not before the judge at chambers, but it did not appear whether or not the facts contained in it had been stated to him.

Charles Russell shewed cause. The interrogatory, no doubt, is one which tends to criminate the defendant, but that does not deprive the plaintiffs of their right to ask it, and the defendant, if he objects to answer it, will then have to state his objection upon oath. This is no special hardship to the defendant, for if he were in the witness-box the

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plaintiffs would certainly be entitled to ask him this question. The cases of *Osborn* v. *London Dock Co.* (1), and *Bartlett* v. *Lewis* (2), are instances in which questions tending to criminate the person interrogated were allowed to be put. The real question in all such cases is, whether the question is put bonâ fide, or not. If there is any reason to think it is not, but that there is some ulterior object, such as to obtain evidence for a criminal prosecution in view, then, of course, it will not be allowed. The cases of *Edmunds* v. *Greenwood* (3), and *Villeboisnet* v. *Tobin* (4), will be relied on upon the other side, but they expressly decide that there is a discretion with the judge, and in both those cases the interrogatories had been disallowed at chambers. Here the judge, in the exercise of his discretion, has allowed the question, and this Court will not interfere. The only reported cases in which the Court has interfered with the discretion of the judge at chambers are *Stern* v. *Sevastopulo* (5), and *McFadzen* v. *Mayor and Corporation of Liverpool.* (6)

It will put the plaintiffs to great trouble and expense if they have to prove that the defendant sent the letter, and he can have no real objection to answer the interrogatory, for he has already, in effect, admitted that he sent the letter, in an affidavit which he made when applying for a commission to examine witnesses in Nova Scotia. [The affidavit was handed up to the Court.]

Raymond, in support of the rule. In *Edmunds* v. *Greenwood* (3) the Court, after going through all the cases, decided that such a question ought not to be allowed. The judge at chambers there had disallowed it on the ground that such a question ought not to be put, unless in exceptional circumstances, because it would lay the defendant open to an indictment for libel, and the Court upheld his decision. Here the ordinary affidavit was used, and there were no grounds shewn for granting such an exceptional right. In *Villeboisnet* v. *Tobin* (4), Montague Smith, J., says: "Such interrogatories will not be allowed on the common affidavit only, but some special circumstances must be laid before the judge, by affidavit or otherwise."

(1) 10 Ex. 698; 24 L. J. (Ex.) 140.
(2) 12 C. B. (N. S.) 249; 31 L. J. (C.P.) 230.
(3) Law Rep. 4 C. P. 70.
(4) Law Rep. 4 C. P. 184.
(5) 14 C. B. (N. S.) 737; 32 L. J. (C. P.) 268.
(6) Law Rep. 3 Ex. 279.

[BRETT, J. If the person to whom the libel was sent refused to give evidence, and was shewn to be under the defendant's influence, that might constitute sufficiently exceptional circumstances.]

The affidavit used by the defendant when he applied for a commission to Nova Scotia was not before the judge at chambers.

[BOVILL, C.J. The facts may have been stated to him and not denied.]

If that affidavit is of any effect, it must be because it amounts to an admission that the defendant sent the letter, and if so, it renders the question unnecessary, and it cannot, therefore, justify the interrogatory being allowed.

BOVILL, C.J. In all the cases the Courts have refused to lay down a fixed rule upon the question whether interrogatories should be allowed which tend to criminate the party interrogated. It is a matter upon which the judge at chambers must exercise his discretion; and it was so stated in *Edmunds* v. *Greenwood* (1), and *Villeboisnet* v. *Tobin.* (2), in both of which cases the Court refused to interfere with the discretion of the judge. The party applying to set aside a judge's order must in each case shew the Court that the judge has exercised his discretion improperly. In the present case an order allowing the interrogatory has been made by Blackburn, J., and it lies upon the defendant to shew that the order was wrong. If, however, we could see clearly that his discretion had been wrongly exercised, we should reverse his decision; and the cases I have cited shew that he would not have been justified in allowing the interrogatories unless there were some special circumstances to justify his doing so. Were there, then, any such circumstances? It appears the action was brought for a libel in sending a letter to the *Times*, and the defendant has pleaded a justification, and the affidavit on which the order was obtained stated the plaintiffs' belief that the defendant had in his possession the original letter, an extract from which was contained in the letter to the *Times*, and the defendant, when he applied for a commission to Nova Scotia, and stated in an affidavit he used on that occasion, that the alleged libel was contained in a letter which he received from a merchant in Nova Scotia, that believing the statements to be true,

(1) Law Rep. 4 C. P. 70. (2) Law Rep. 4 C. P. 184.

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he had pleaded a justification, and that some persons residing in Nova Scotia would be necessary witnesses for him; the defendant, therefore, has not only pleaded a justification, but states that he must examine witnesses in support of his plea. Looking at all the circumstances, I think it was a fit case for the order that was made.

KEATING, J. I am of the same opinion. We are asked to rescind a judge's order. We cannot interfere with the discretion of a judge at chambers, unless he is shewn to have been clearly wrong; but a judge should not make an order for such an interrogatory as the present, except under special circumstances. Here I think that we clearly ought not to disturb the order that has been made, since the question is almost a formal one after the affidavit of the defendant; which shews that the real matter to be fought was the justification of the libel, and not whether it was published by the defendant or not.

MONTAGUE SMITH, J. I am entirely of the same opinion. It is plain from the authorities that there is no rule that such an interrogatory as this should never or may always be put; in each case the Court must take into consideration the special circumstances. In *Villeboisnet* v. *Tobin* (1) I said, "As far as I can see, the only intelligible rule to be deduced from the cases, including that of *Edmunds* v. *Greenwood* (2), is, that when the interrogatories are bonâ fide put for the purpose of discovery and are relevant to the matter in issue, they may be allowed, although the answers to them may tend to criminate the party answering (if answered in one way), leaving to such party the option of refusing to answer on that ground. But where such interrogatories are sought to be put, the Court and the judge at chambers will require a stronger case to be made out for allowing them than is requisite in ordinary cases, and such interrogatories will not be allowed on the common affidavit only, but some special circumstances must be laid before the judge, by affidavit or otherwise, to induce him to order them." I am still of the same opinion, and cannot express it otherwise; I think here there are special circumstances which justified the judge in making the order, and I am not inclined therefore to interfere.

(1) Law Rep. 4 C. P. 184, 191. (2) Law Rep. 4 C. P. 70.

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BRETT, J. I confess to being considerably disappointed that in *Edmunds* v. *Greenwood* (1) we did not lay down a more definite rule than it seems we did. I hoped the rule then enunciated was that such an interrogatory as the present was not generally to be allowed but only if there were exceptional circumstances. I still more thought so after *Villeboisnet* v. *Tobin* (2), which seemed to me to put upon *Edmunds* v. *Greenwood* (1) the interpretation I had hoped for. In these cases the question to be put is one, the immediate effect of answering which, if answered as is expected, will be to criminate the person answering; when such a question is put to a witness in open court a caution is usually given by the presiding judge to the witness that he is not bound to answer: in the case of interrogatories administered by order no such authoritative caution can be given; and I think, therefore, the leave of a Court or judge, which is required before they can be asked, and which is the only protection under such circumstances to the person interrogated, should not be granted except under special circumstances. However, it seems that *Edmunds* v. *Greenwood* (1) did not lay down a rule so definite; it is now supposed to have laid down this rule only that the judge must exercise his discretion, and that he will require more than ordinary circumstances to induce him to allow the interrogatories. I agree that, if that be the rule, there are such circumstances here, for though I should have thought that merely pleading a justification would not be enough, yet here there is also the affidavit of the defendant saying that he believes his statements to be true, and asking for a commission to examine witnesses in support of them; and that seems to make the real question in dispute the truth of the libel, and not whether it was published by the defendant; and, if so, it may be said that this question is only a matter of form, which, perhaps, would justify the order of the judge, even if *Edmunds* v. *Greenwood* (1) were considered to have gone as far as I had thought.

Rule discharged.

Attorneys for plaintiffs: *Gregory, Rowcliffes, & Rawle.*
Attorney for defendant: *W. J. Wilkinson.*

(1) Law Rep. 4 C. P. 70. (2) Law Rep. 4 C. P. 184.

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June 30.

ELLIOTT *v.* RICHARDSON AND OTHERS.

Contract—Illegality—Company—Winding-up Acts—Maintenance.

8 Q B 205.
9 C L D 387

An agreement by a shareholder in a company which is being compulsorily wound up that, in consideration of a pecuniary equivalent, he will endeavour to postpone the making of a call, or will support the claim of a creditor, is illegal, as being contrary to the policy of the Winding-up Acts.

A. and B. were shareholders in a company then being compulsorily wound up under the provisions of the Companies Act, 1862, and B. was also a creditor of the company. An agreement was entered into between them, by which A. agreed to use his influence to obtain the postponement of a call then about to be made, and to support B.'s claim, and B. in consideration thereof agreed to pay all calls made on A.'s shares. In an action by A. against B. on this agreement for not paying certain calls made on his shares, B. pleaded that the agreement was made without the knowledge of the Court of Chancery, or the other shareholders or creditors, and with intent to obtain a postponement of the call and payment of dividends on the whole of B.'s debt to the prejudice of the other shareholders and creditors, though A. knew that B.'s claim was disputed, and believed that only a portion of it was due:—

Held, that the plea was good as shewing that the agreement was contrary to the policy of the Winding-up Acts, and therefore void.

Semble, per Willes, J., that the agreement to support B.'s claim was also void as being within the spirit of the law against maintenance.

DECLARATION: "That before and at the time of making the agreement hereinafter mentioned, and until the time of the breach thereof hereinafter alleged, the Anglo-Greek Steam Navigation Company, Limited, was being wound up compulsorily by official liquidators, duly appointed by and under the direction of the Court of Chancery; and the plaintiff was during all the time aforesaid a shareholder in and contributory to the company in respect of 187 duly registered shares in the company of 25*l.* each, on which 16*l.* per share, and no more, had been paid up; and the defendants were jointly or severally shareholders in and contributories to the company in respect of a large number, to wit, 3000 duly registered shares of 25*l.* each in the company, on which 2*l.* 10*s.* per share had been paid up, and no more; and at the time of making the agreement the defendants claimed to be entitled to prove against the assets of the company as creditors of the company for a very large amount, which claim the plaintiff, as such contributory, was then entitled to oppose; and certain other persons

then claimed to prove against the assets of the company as creditors of the company; and the defendants then were endeavouring and negotiating with such other persons with a view to the buying up or settling by the defendants of the claims of such other persons against the company; and the defendants were desirous that in the meantime no call should be made by the liquidators on the contributories to the company, and that a call by the liquidators on the contributories then in contemplation should be postponed; and thereupon, in consideration that the plaintiff would use his best endeavours to support and help the defendants in postponing the call, and also in respect of the claim, and in any future action which might be taken by the defendants with respect to the company, the defendants promised the plaintiff to indemnify him, and hold him harmless in respect of all future calls which might be thereafter made by the liquidators on the plaintiff in respect of his shares in the company; and the plaintiff accordingly used his best endeavours to support and help the defendants in postponing the call, and in respect of their claim, and otherwise according to his agreement, of which the defendants always had notice; and although certain calls were afterwards made by the liquidators on the plaintiff in respect of his shares, and the plaintiff thereupon and thereby was compelled to and did make certain large payments, and became, and was, liable to make certain other large payments on account of such calls, to wit, in the whole a payment of 9*l.* per share in respect of each of his shares of which the defendants had notice; and though all things were done, &c., to entitle the plaintiff to be indemnified, and held harmless in respect of the respective payments which he has been so compelled to pay, and has so become liable to pay as aforesaid, and on default by the defendants to maintain this action for the breach hereinafter mentioned, yet the defendants have not indemnified the plaintiff, or held him harmless in respect of the said payments or any of them."

7th Plea: "That at the time of the making of the said promise there were shareholders in the company other than the plaintiff and defendants, and who would be liable to pay the said call, and any call which might be made by the liquidators, or otherwise upon the shareholders of the company, and other creditors of the

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company, who were entitled to be paid their debts due from the company out of the call, and any call which might be so made: that the agreement was made without the knowledge, privity, or consent of the Court having jurisdiction in the said winding-up, or of the official liquidators or shareholders or creditors of the company with the object and intent of enabling the defendants to obtain a postponement of the said call, and payment of dividends upon the whole of the defendants' debt or claim under the winding-up to the prejudice of the other shareholders and creditors of the company, although the debt and claim of the defendants was not an admitted debt or claim, but the amount of the debt was a matter in dispute between the defendants and the company and the liquidators, all which the plaintiff always well knew, and although the plaintiff then believed that a portion only of the defendants' alleged claim was then in fact due to them, and the plaintiff could, and might, and ought under the statutes in that behalf to have opposed the postponement of the call, and the defendants' proof of the defendants' debt or claim: and, that the company was at the time of the making of the defendants' promise being wound up compulsorily under the Companies Act, 1862, and the other Acts of Parliament in that behalf."

Demurrer and joinder.

Holl (*Sir J. Karslake* with him), in support of the demurrer. There is nothing in the plea to shew that the agreement sued upon was illegal or immoral. The plaintiff had a right to use lawful means to obtain a postponement of the call; and with respect to the support of the defendants' claim, the defendants must be taken to have believed it to be all due, and their claim, therefore, was not dishonest, and the plaintiff may have considered them morally entitled to the whole, though believing only part legally due.

Prentice, Q.C. (*Philbrick* with him), in support of the plea. The agreement is shewn by the plea to have been illegal: if a man took 5*l.* not to vote at the next election of members of parliament, it would be illegal, although he is not bound to vote; so an agreement for money not to give evidence on a civil trial would be illegal. In *Hall* v. *Dyson* (1) a creditor agreed, for money, not to

(1) 17 Q. B. 785; 21 L. J. (Q.B.) 224.

oppose his debtor's discharge under a bankruptcy, and the agreement was held void as being against the policy of the Insolvent Debtors Act. Other cases of the same kind are *Wilkin* v. *Manning* (1); *Coppock* v. *Bower* (2); *Hills* v. *Mitson* (3); *Nerot* v. *Wallace* (4); *Collier* v. *Kilham* (5); *Rogers* v. *Kingston.* (6) The cases are collected in the notes to *Collins* v. *Blantern* (7) which was decided upon similar principles.

Holl, in reply. If shareholders have conflicting interests as to the time of making a call, it is not illegal that two whose interests are the same should agree to act together, and one promise to indemnify the other. In all the cases that have been cited the agreement either contravened some statute or was in express opposition to the course of justice.

[WILLES, J., referred to *Egerton* v. *Earl Brownlow* (8) and *Simpson* v. *Lord Howden* (9).]

The latter case is in favour of the plaintiff, as the agreement was there upheld. The plaintiff here is not selling his judgment and agreeing to act as the defendants choose, but has exercised his choice, and made the agreement accordingly.

[KEATING, J. The plea alleges that he might, could, and ought to have opposed the postponement of the call.]

That is only a general averment, and no grounds are given for it.

[MONTAGUE SMITH, J. In *Waldo* v. *Martin* (10) the plaintiff resigned an office of profit which he held for life, and recommended Mr. Farrer, who had the right of appointment, to appoint the defendant, there being a private agreement, unknown to Mr. Farrer, that they should share the emoluments; and there the agreement was held void.]

That was on the ground that it was a fraud on Mr. Farrer.

WILLES, J., after stating the substance of the pleadings, proceeded:—Is such an agreement, under the circumstances disclosed

(1) 9 Ex. 575; 23 L. J. (Ex.) 174.
(2) 4 M. & W. 361.
(3) 8 Ex. 751; 22 L. J. (Ex.) 273.
(4) 3 T. R. 17.
(5) 15 Jur. 1175.
(6) 10 J. B. Moore, 97.
(7) 1 Sm. L. C. 5th ed. 310.
(8) 4 H. L. C. 1, 148; 23 L. J. (Ch.) 348.
(9) 9 Cl. & Fin. 61.
(10) 4 B. & C. 319.

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in the pleadings, one which can be enforced in a court of law? The plaintiff insists that it can, because he had a right to bring about a postponement of the call if he could, and because, even if his agreement to uphold the defendants' claim was dishonest, the dishonesty was not shared in by the defendants. With respect to the latter point, I own I am unable to arrive at any such conclusion; and I should have thought, if it had been necessary to decide, that an agreement to help a person to support a claim, when he knew that that person was only entitled to part, came within the rules of law against maintenance, because it was to uphold a claim to the disturbance of common right, which is Lord Coke's definition of maintenance. (1) But if that could be got rid of because the defendants were innocent, as he says, how is the rest of the plea to be regarded, which, in effect, states that two persons were interested in the winding-up of a company, and that they agreed to procure that a call should be postponed and a claim proved, to the detriment of the other shareholders and creditors of the company? I think that would be a good plea.

I should be willing to rest my judgment on the first point, but it is better for the parties that I should state my impression on the latter also; I think such an agreement amounts to an interference with the course of public justice. In order to explain my view on that point, we must look at the nature of the Winding-up Acts. But for these Acts a creditor would have to sue the company, and then proceed against the individual shareholders. Previous to the provisions of 8 & 9 Vict. c. 16, he would have had to proceed by scire facias, but by that Act a more compendious proceeding is allowed if a judge will make an order for payment in the first instance; but even this is often not convenient to a creditor, as it requires him to take proceedings against many shareholders, and the creditor often has to bear a large amount of extra costs; nor is it convenient to the shareholders, because a creditor can come upon one shareholder for the whole amount of his debt, of which he ought only to bear a proportion, leaving him to his remedy over against the other shareholders: thus there is a double process necessary to settle the rights of the parties, and great expense and complication frequently arise; the legislature, therefore, have given relief to the shareholders by

(1) Co. Litt. 368 B.

the Winding-up Acts, and the result is, that, on a company being insolvent, the Court of Chancery may put its affairs in the way of being wound up, either voluntarily or compulsorily, under the direction of the Court; and the rules of law and the rights of the shareholders differ according as the winding-up is voluntary or compulsory. A compulsory winding-up is a legal process, under the direction of the Court, for the purpose of doing complete justice to all parties, by making calls on the shareholders and paying off the creditors; and, of course, it must have been the intention of the legislature, in providing that such proceedings should be substituted for the old method by which creditors obtained their debts, that the winding-up should be a process which should bring matters to a conclusion within a reasonable time, within which justice would be finally done, so that the shareholders might be relieved. It seems to me that this is an essential part of the intentions of the legislature, that the proceedings should be taken with reasonable speed; and that being so, any secret agreement by which persons who are given a locus standi, as representing their own interest, should, for money, undertake to delay proceedings to the prejudice of the other shareholders and creditors, is void, not only as being against public policy, but as being against the clear intention of the legislature under the Winding-up Acts. Therefore, even without authority, I think we ought to say that the contract arises ex turpi causâ, and cannot be enforced.

KEATING, J. I am of the same opinion. It appears that the plaintiff and defendants are shareholders in a company which is being wound up compulsorily, and the defendants also are creditors, their debt not being admitted. Things being in this state, the agreement entered into is in consideration that the plaintiff would use his best endeavours to support and help the defendants in postponing the call, and also in respect of their claim; and, in any future action which might be taken by the defendants with respect to the company, the defendants promised the plaintiff certain advantages which it is the object of this action to enforce. I am of opinion that the agreement cannot be enforced, because the plea shews that at the time of making it, there being other shareholders who would be liable to pay any call, and creditors who

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were entitled to have their debts paid, the contract was made without the knowledge or privity of the Court, shareholders, or creditors, and it was made with the intention of both parties that the defendants should obtain the postponement of the call, and payment of dividends on the whole of their claims. That appears to me to be contrary to the policy of the Winding-up Acts, the object of which is that the process of winding up should be governed by all parties in a free and unfettered manner; and here the plaintiff for money undertakes to help the defendants to obtain the postponement of a call which would otherwise have been made, and that with the intent to injure the other shareholders. I think that is contrary to the policy of the Acts, and I prefer to put my judgment upon that ground without at all differing from Willes, J., in what he has said respecting the agreement being within the law respecting maintenance. I think, therefore, that the plea is good; and our judgment, therefore, should be for the defendants.

MONTAGUE SMITH, J. I am of the same opinion. I think that the agreement described in this declaration and plea is unlawful, and cannot be enforced. The substance of the agreement really is that the plaintiff, a shareholder of the company, of which the winding-up had begun, binds himself to the defendants to exercise his powers as shareholder in a particular way, which may be to the prejudice of other shareholders; he promises to use his best endeavours to help the defendants to obtain a postponement of a call and the payment of their whole claim, and he binds himself to do that, whatever may be the effect of the winding-up; and this agreement was secret, a circumstance which, I think, makes it especially vicious; and though the plaintiff may only have intended to use measures that may be lawful, yet the fact of his having taken a money consideration to bind himself to act in this way renders this agreement contrary to the policy of the Companies Act, 1862. (1) The 90th clause of that Act provides, that where an order has been made for winding up a company, any share capital "which may not have been called up shall be deemed to be assets of the company, and to be a debt due to the company

(1) 25 & 26 Vict. c. 89.

from each member to the extent of any sums which may be unpaid on any shares, and payable at such time as may be appointed by the Court." Therefore, at the time of the winding-up, all these unpaid portions of shares became assets of the company, to be applied for the benefit of creditors, and ultimately of shareholders. By the 91st section the Court may have regard, as to all matters relating to the winding-up, to the wishes of the shareholders, and may give effect to those wishes where they can do so with justice to the creditors. When the company's assets are being administered under these winding-up clauses the position of the company is much the same as that of a bankrupt; and when a shareholder or creditor makes a secret agreement by which the assets may be disposed of otherwise than they would be in the ordinary course of a winding-up, such an agreement ought not to be enforced, because it is against the spirit of the Act. One consequence of such an agreement is that the whole body of creditors and shareholders may be deceived, and think when one shareholder gives advice that a call shall be postponed that he is exercising his own judgment and sense of equity; and when he supports the claim of another he may be similarly thought to be exercising his own judgment; and if his support has been really purchased, as here, the other shareholders may be deceived. On these grounds, I think the agreement is illegal, and that our judgment should be for the defendants.

Judgment for the defendants.

Attorneys for plaintiff: *Lewis, Munns, Nunn, & Longden.*
Attorneys for defendant: *Van Sandau Cumming & Son.*

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ACKNOWLEDGMENT OF MARRIED WOMAN—*Fines and Recoveries Act* (3 & 4 *Wm.* 4, *c.* 74)—*Examination before One Commissioner—His Death—Absence of Affidavit.*] Where one of two commissioners who had taken the acknowledgment of a deed by a married woman was interested, and had taken no part in the examination, and in consequence of the death of the other commissioner (who was not interested) the affidavit required by Rule 3 of Hilary Term, 4 Wm. 4, could not be made.—The Court refused to allow the certificate of acknowledgment to be filed:—*Semble* that, except in cases of reasonable necessity, both the commissioners ought to be disinterested. EX PARTE MENHENNET - [16

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16 Vict. c. 55, s. 9.—Upon the admittance of the defendant, the substituted trustee under the above decree, the lords of the manor claimed two fines, one for his admittance, and another as for the admittance of P. J. P., the customary heir:—*Held*, that the lords were entitled to one fine only. Bristow *v.* Booth - - - - 80

ADVERTISEMENT FOR TENDERS—*Contract.*] The defendants sent out a circular, as follows:—"We are instructed to offer to the wholesale trade for sale by tender the stock in trade of A., amounting, &c., and which will be sold at a discount in one lot: payment to be made in cash: the tenders will be received and opened at our offices," &c.:—*Held*, that this did not amount to a contract or promise to sell to the person who made the highest tender. Spencer *v.* Harding - - 561

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AGREEMENT FOR LEASE—*Equitable Mortgage of Fittings and Fixtures.*] The plaintiff agreed to let to one B. premises in Holborn, which B. was to fit up forthwith as a luncheon-bar and restaurant, such fittings to be of the value of 500*l.* and to the plaintiff's satisfaction, and B. was to pay a premium of 1000*l.*, upon payment of which, "the premises being fitted up as aforesaid," the plaintiff was to grant B., and B. agreed to take, a lease for twenty-one years; and the plaintiff further agreed to lend or obtain for B., "upon security of the said premises as fitted and licensed," 1000*l.* for two years at 5 per cent. Before any lease was granted or any money paid, B. became bankrupt, and his assignee seized and sold the fittings and fixtures under an order of the Court:—*Held* (affirming the judgment of the Court of Common Pleas), that, until the execution of the proposed lease, the agreement constituted an equitable contract between the plaintiff and B. that "the premises as fitted and licensed" should stand as a security for the 1000*l.* premium, and consequently that the plaintiff was entitled to them as equitable mortgagee. Tebb *v.* Hodge - Ex. Ch. 73

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"AT AND FROM" A PORT—*Marine Insurance—Insurable Interest—Chartered Freight—Policy—Inception of Risk.*] A vessel, when about to proceed on a voyage with cargo from Calcutta to Mauritius, was chartered "to proceed with all convenient speed on her present voyage to Mauritius, and, having discharged her cargo there," to "sail and proceed to Akyab, &c., and load from the charterers a cargo of rice for a port in the United Kingdom." Subsequently the owner insured the freight to be earned under the charter-party by an insurance "at and from Mauritius to rice ports, and at and thence to a port of discharge in the United Kingdom," on "chartered freight, valued at 1150*l.*" The vessel was afterwards lost at Mauritius, by a peril insured against, before she had discharged the whole of her cargo there:—*Held*, upon the authority of *Thompson* v. *Taylor* (6 T. R. 478) and *Barber* v. *Fleming* (Law Rep. 5 Q. B. 59), that the risk on the policy attached upon the arrival of the vessel at Mauritius, and that the assured was therefore entitled to recover Foley *v.* The United, &c., Insurance Company of Sydney - - Ex. Ch. 155

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AVOIDING TOLLS—*Turnpike Act* (3 *Geo.* 4, *c.* 126), *s.* 41—*Leaving Carriage on a Highway.*] By the General Turnpike Act (3 Geo. 4, c. 126), s. 41, it is provided that if any person shall leave upon a turnpike road any horse, cattle, beast, or carriage whatsoever, by reason whereof the payment of any tolls or duties shall be avoided or lessened, he shall forfeit any sum not exceeding 5*l.*—A. was driven by his coachman from his house along a turnpike road up to but not through a turnpike gate. A. then got out and walked through the gate to a railway station beyond it, and went away by a train, and his coachman drove the carriage back to his house:—*Held*, that A. had not left his carriage upon the road within the meaning of the Act, and had not therefore incurred the penalty imposed. Stanley *v.* Mortlock - - - - - - 497

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BUILDING CONTRACT—*Construction—Certificate of Architect—Party taking advantage of his own Wrong.*] The plaintiff contracted to erect buildings for the defendants according to certain plans and drawings, the whole to be completed for a given sum by a day named. By clause 3 of the contract, additions or alterations were not to invalidate the contract, but were to be added to or deducted from the contract-price as the architect should consider just. By clause 4 the architect was to be at liberty to give fresh drawings and so to vary the mode in which the work was to be done. By clause 24 it was provided that, if by reason of additions, &c., or in consequence of inclemency of weather, or for want or alleged deficiency of any orders, drawings, or directions, &c., the contractor should in the opinion of the architect have been unduly delayed or impeded in the completion of the contract, the architect might grant an extension of time for the completion. By clause 27 it was provided that, in case the contractor should fail in the due performance of any part of the contract, or should become bankrupt, &c., or should not, in the opinion and according to the determination of the architect, exercise due diligence and make such due progress as would enable the works to be effectually and efficiently completed at the time stipulated, the defendants might determine the contract by notice, and take possession of the works, plant, and materials, and use or sell them, &c.; and in that event the architect was by clause 28 to determine what, if anything, should be paid to the plaintiff. By clause 29 a penalty was imposed on the plaintiff for any default: and by clause 34 all differences were to be referred to the architect, whose decision was to be final, without giving

BUILDING CONTRACT—*continued.*

any reasons. In an action against the defendants for preventing the plaintiff from performing the contract, they pleaded, thirdly, that the plaintiff failed in the due performance of certain parts of the work, and did not in the opinion of the architect exercise due diligence and make such due progress as provided by clause 27, and as would have enabled the works to be efficiently and effectually completed at the time agreed, and that they gave the plaintiff a notice under that clause that they determined the contract, and took possession of the works, &c. To this plea the plaintiff replied,—2. That the alleged failure and non-exercise of due diligence by the plaintiff were caused by the default of the defendants and the architect in supplying plans and drawings and in setting out the land and defining the roads and giving such particulars as would enable the plaintiff to commence the works. 3. That the alleged failure, &c., of the plaintiff were wholly caused by reason of matters and things provided for in clause 24, by reason whereof the plaintiff was in fact, and in the opinion of the architect, unduly delayed and impeded in the completion of the contract; that all conditions were fulfilled, &c., to entitle the plaintiff to have an extension of the time; but that the architect failed and neglected to grant such extension. 4. A similar replication to the third, leaving out the words "and in the opinion of the architect." To the second replication, the defendants rejoined,—1. That the non-exercise by the plaintiff of such due diligence, and the not making by the plaintiff of such due progress, were not in the opinion and according to the determination of the architect caused by the acts or defaults of the defendants or their architect, or by breaches of contract by the defendants. 2. The like, and further that the opinion and determination of the architect were formed and arrived at upon and after due and reasonable consideration of the facts. Upon demurrer, the Court of Common Pleas held all the replications to be bad in substance, and the rejoinders to be good in substance,—on the ground that, the parties having constituted the architect the sole judge, his certificate justified the defendants in putting an end to the contract. The majority of the Court of Exchequer Chamber, (Kelly, CB., Channell, B., Blackburn and Mellor, JJ.) agreeing with the Court below that the third and fourth replications were bad, reversed their decision,—holding the second replication to be good in substance, and the two rejoinders thereto bad; for that—it being admitted on the record that the alleged failure of the plaintiff to use such due diligence and to make such due progress as to enable him to complete the works by the day specified were caused by the failure of the defendants and the architect to supply plans and set out the roads necessary to enable the plaintiff to commence the works; and clause 27 not conferring a power upon the architect to determine, and to bind the plaintiff by his determination, that the defendants had not by their own wrongful act or default prevented the plaintiff from proceeding with the works, although they had in fact so prevented him,—the rule of law applied, which exonerates one of two contracting parties from the performance of a contract, where the

BUILDING CONTRACT—*continued.*
performance of it is prevented or rendered impossible by the wrongful act of the other contracting party. Cleasby and Pigott, BB., dissented, holding that the architect having been constituted the final judge of the matter, his certificate justified the defendants in putting an end to the contract, under clause 27. Roberts *v.* The Bury Improvement Commissioners.
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CERTIFICATE OF REGISTRATION—*Bankrupt Act*, 1849 (12 & 13 *Vict. c.* 106), *s.* 112—*Bankruptcy Act*, 1861 (24 & 25 *Vict. c.* 134), *s.* 198—*Deed under s.* 192—*Arrest—Discharge of Debtor—Sheriff—Trespass.*] The sheriff is not liable in trespass for arresting or detaining a debtor who has executed a deed of assignment under s. 192 of the Bankruptcy Act, 1861, after production of a certificate of registration; the debtor's remedy being by application to the Court or a judge for his discharge from custody, or possibly by a proceeding against the bailiff under s. 112 of the Bankrupt Act, 1849.—*Ames* v. *Colnaghi* (Law Rep. 3 C. P. 359) explained. Ames *v.* Waterlow [53

2. —— *Sheriff—Escape—Neglect to Plead Deed of Composition—Bankruptcy Act*, 1861 (24 & 25 *Vict. c.* 134), *ss.* 192, 198—*Bills of Exchange Act* (18 & 19 *Vict. c.* 67)—*Practice.*] Where a debtor, having had an opportunity to plead a deed under the Bankruptcy Act, 1861, s. 192, has neglected to do so, both he and the sheriff, provided the latter has notice of the facts, are estopped from relying on it, under s. 198, as a bar to an execution.—B. was on the 3rd of August served with a writ under the Bills of Exchange Act, at the suit of A., and on the 5th B. executed a composition-deed, which was registered on the 13th. On the 15th judgment was signed for non-appearance to the writ, and a ca. sa. issued on the 25th of September, under which B. was arrested. The sheriff, having notice of these facts, released B. from custody on being shewn the certificate of registration of the deed:—*Held*, that the sheriff was liable to an action for an escape.—*Semble*, that the debtor might have obtained leave to appear to the writ at any time after the execution of the deed, and was not bound to wait until it was registered. Allen *v.* Carter. - - 414

CHAMBERS—Inns of Court—Vote for parliament —Tenant - - - - 246
See Vote for Parliament. 6.

CHANGE OF VENUE—*Practice—Preponderance of Convenience—Place of cause and of Defendant's Abode.*] In an action for the breach of a contract made at Liverpool, where the defendant resided, and where the contract was to be performed, the venue was laid in London. A judge at chambers on the defendant's application ordered the venue to be changed to Liverpool, upon an affidavit that all the defendant's witnesses, thirteen in number, resided there, and that a cross-action arising out of the same contract was pending there, notwithstanding that the plaintiff's affidavit stated that all but one of the plaintiff's witnesses, twenty-eight in number, resided in London.—The Court refused to interfere. Levy *v.* Rice - - 119

CHAPEL—Pew—County vote for parliament 235
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—— Marine Insurance—Inception of risk [Ex. Ch. 155
See "At and From" a Port.
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COMMENCEMENT OF RISK—Marine Insurance [Ex. Ch. 155
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See Taxation of Costs. 2.
COMMON LAW PROCEDURE ACT, 1852: *See* Statutes—15 & 16 Vict. c. 76.
—— **1856**: *See* Statutes—17 & 18 Vict. c. 125.
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See Illegal Contract.
—— Railway: *See* Railway Company.
COMPOSITION DEED: *See* Creditor's Deed.
CONDITION—Release - - - 607
See Confession of Plea.

CONFESSION OF PLEA—*Pleading—Confession of Plea under Rules* 22 *and* 23 *of Trinity Term*, 1853—*Estoppel—Release subject to condition subsequent—Deed under Bankruptcy Act*, 1861 (24 & 25 *Vict. c.* 134) *s.* 192.] To an action on a bill of exchange, the defendant pleaded that the plaintiff sued him in a former action for the same cause, to which the defendant on the 3rd of November, 1868, pleaded a deed of composition under the Bankruptcy Act, 1861, dated the 8th of October, 1868, which was after action brought, whereby the defendant covenanted to pay his creditors 1*s.* in the pound by two instalments of 6*d.* each on the 6th of April and the 6th of October, 1869, in consideration of which the creditors released the defendant from their several debts, with a proviso that if default should be made by the defendant in payment of the composition the deed should become void and the creditors should not be bound by the covenants therein contained, and that all things were done, &c., to make the deed an answer to the action; that on the 13th of April, 1869, the plaintiff replied that the defendant failed to pay the instalment due on the 6th of April, 1869, whereby the deed and the release therein contained became void; that the defendant rejoined equitably that the 6th of April, 1869, was subsequent to the date of the plea, and that he had by mere mistake omitted to pay the instalment on the day, but before replication, viz. on the 8th of April, he tendered it to the plaintiff; that, on the 25th of May, the plaintiff confessed the plea, withdrew his replication, entered a nolle prosequi, and taxed and received his costs in respect thereof, and so the first action was finally determined against the plaintiff (except as aforesaid), and that the plaintiff was estopped from bringing a fresh action for the same cause.—Replication, that the plaintiff ought to be admitted to implead the defendant, by reason of the defendant's failure in the due payment of the instalment of the composition on the 6th of April, whereby the release became null and void:—*Held*, on demurrer to the replication, that the plea was a good answer to the action, as the effect of the confession of the plea in the former action, under rules 22 and 23 of Trinity Term, 1853, was to put an end to the litigation altogether as it stood at the time of the confession.—*Held*, also, that the release was good, notwithstanding it was made subject to a condition subsequent, but that the plaintiff might have replied in the former action that the release, which was itself after action, though operative when pleaded, had become avoided by non-payment of the composition. Newington *v.* Levy - - - 607

CONSIDERATION—Guarantee - - 65
See Continuing Guarantee.
CONSTRUCTION OF BUILDING CONTRACT—Certificate of architect Ex. Ch. 310
See Building Contract.
CONSTRUCTION OF GUARANTEE—Renewal—Surrounding circumstances - 595
See Renewal of Guarantee.
CONSTRUCTION OF POLICY—"Thirty days after arrival"—"Good safety" - - 190
See "Good Safety."
CONSTRUCTION OF WILL—Accruing share 614
See Accruing Shares.

CONTINUING GUARANTEE—*Construction—Consideration.*] In April, 1867, in order to induce the plaintiff to continue his dealings with one F., who was then largely indebted to him, the defendant gave the plaintiff a guarantee as follows:—"In the event of your supplying Mr. D. F. any coals during the next twelve months from the 1st of April last past, I do hereby guarantee the payment to you of the amount for the time being due from Mr. D. F. for coals sold by you to him."—Before the expiration of the twelve months mentioned in the above guarantee, viz. on the 23rd of July, 1867, the debt due from F. to the plaintiff having greatly increased, and the plaintiff pressing for a settlement, the defendant gave him a further guarantee, as follows:—"Whereas Mr. D. F. is and stands indebted to you in the sum of 2205*l.* 3*s.* 9*d.* upon an account this day stated and settled between you and the said D. F., in addition to his liability upon two acceptances of mine to his drafts each for 750*l.*, dated 3rd of July, 1867, and payable three and four months after date, and respectively indorsed to you by the said D. F.; and whereas you are pressing for the immediate payment of the said sum of 2205*l.* 3*s.* 9*d.*: now, I do hereby, in consideration of your forbearing to take immediate steps for the recovery of the said sum, guarantee the payment of, and agree to become responsible for, any sum of money for the time being due from the said D. F. to you, whether in addition to the said sum of 2205*l* 3*s.* 9*d.* or no:"—*Held*, that this was a guarantee for future supplies of coal, unlimited both as to time and amount. Coles *v.* Pack 65

CONTRACT—Advertisement for tenders - 561
See Advertisement of Tenders.

CONTRACT—*continued.*
—— Agent—Custom of market - - 646
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—— Bill of exchange—Oral evidence to vary 37
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—— Building—Certificate of architect Ex. Ch. [310
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COPYHOLD—Admittance—Trustee—Fine 80
See Admittance to Copyhold.
CORPORATION—Vote for parliament—Occupation - - - - - 262
See Vote for Parliament. 8.
—— Vote for parliament—Qualification - 282
See Vote for Parliament. 9.

CORRUPT PRACTICES PREVENTION ACT, 1854 (17 & 18 *Vict. c.* 102)—*Test Ballot—Bribery and Treating—Special Case—Costs.*] On a vacancy in the representation in parliament for the city of B., three liberal candidates, viz. R., H., and O., offered themselves. It was arranged between them that a "test-ballot" should be taken, and that the one at the head of the ballot should alone stand for the city in the liberal interest, and that the others should support him. The test-ballot was taken, and R. had a majority of votes. H. and O. retired. Subsequently a conservative candidate came forward, and went to the poll against R. R. was returned. A petition was presented against the return of R., on the ground that, after the receipt of the writ for the election, two agents of R. gave money, and one gave drink to voters, to induce them to vote for R. on the occasion of the test-ballot. Upon a case stated for the opinion of the Court, pursuant to s. 11 of the Parliamentary Elections Act, 1868 (31 & 32 Vict. c. 125), in which it was found that "such giving was corrupt;" but that "no bargain was expressly or impliedly made as to their votes on the election, nor did the voters understand or suppose that their votes at the election were bought or engaged, or in any way bargained for:"—*Held*, that the giving the money and drink for the purpose above described was bribery and treating within s. 2, sub-s. 3, and s. 4, of the Corrupt Practices Prevention Act, 1854, and avoided R.'s election. Britt *v.* Robinson 503

COSTS—Appeal from Justices - - 489
See Traveller. 2.
—— "Good Jury"—Writ of Inquiry - 165
See "Good Jury."
—— Parliamentary Elections Act, 1868 [172, 185, 407
See Costs under Parliamentary Elections Act, 1868. 1, 2, 3.
—— Security—Appeal from County Court—Waiver - - - - 634
See County Court Appeal.
—— Taxation - - - - 518
See Taxation of Costs. 3.

COSTS UNDER PARLIAMENTARY ELECTIONS ACT, 1868—(31 & 32 *Vict.* c. 125)—*Petition—Taxation of Costs—Counsel's Fees—Consultations—Preliminary Expenses—Instructions for Brief.*] By s. 41 of the Parliamentary Elections Act, 1868, the costs of a petition are to be defrayed by the parties to the petition in such manner as the Court or judge may determine, and are to be taxed "according to the same principles as costs between attorney and client are taxed in a suit in Chancery:"—*Held*, on a general order for costs under this section that the parties entitled under the order were entitled to an indemnity for all costs that were reasonably incurred by them in the ordinary course of matters of this nature, but not to any extraordinary or unusual expenses incurred in consequence of over caution as to any particular case, or from considerations of any special importance arising from the position or character of either of the parties, or any special desire on his part to insure success. Such extraordinary costs as an attorney would not be justified in incurring without distinct and special instructions from his client ought not to be allowed; nor the costs of purely collateral proceedings upon which a party has failed; nor those which may have been occasioned by his default, negligence, or mistake. Where a principle as to the taxation of costs is involved, the Court will always entertain the question, and, if necessary, give directions to the master; but where it is a question whether the master has exercised his discretion properly, or it is only a question as to amount, the Court is unwilling to interfere unless there are very strong grounds to shew that the master is wrong in the judgment he has formed. On the taxation of the costs of a petition, the master limited the fees of the leading counsel to 100 guineas with his brief and 25 guineas each day for a refresher, and those of the junior to 75 guineas with his brief and 15 guineas each day, in a case of an ordinary character, though the sums actually paid were larger. The Court refused to interfere, but intimated that, where, from its peculiar circumstances, a case was shewn to be of more than ordinary difficulty, the allowance was not necessarily to be so restricted. The master disallowed all the fees for consultations during the trial, holding that they were covered by the allowance for refreshers. The Court directed him to review his taxation in this respect, and to allow such consultations as he might judge to have been reasonable in the progress of the trial. The master disallowed all the costs incurred after the presentation of the petition and before the hearing, allowing instead a gross sum as "Instructions for brief," and there being no sufficient grounds shewn to induce the Court to doubt that he had exercised a right judgment in the matter, they declined to order a review. But, in one case, where it was shewn that there were special circumstances which the master did not appear to have taken into consideration, the Court (Willes, J., dissenting) ordered a review in that respect. The parties are entitled to have the judgment of the master upon the particular items in the preliminary expenses, if they think fit, instead of their being included in the allowance of one sum in gross to cover the whole of what he may think ought to

COSTS UNDER PARLIAMENTARY ELECTION—ACT, 1868—*continued.*

be allowed. The master disallowed the costs of an unsuccessful application at chambers, and to the Court by way of appeal, to increase the amount of the recognizances under s. 6, sub-s. 5, of the Act:—*Held*, that this was an entirely collateral matter, and that the costs were properly disallowed. Hill *v.* Peel. Broad *v.* Fowler. Pegler *v.* Gurney - - - - 172

2. —— *Number of Counsel and their Fees—Consultations — Preliminary Expenses — Instructions for Brief—Number of Witnesses—Length of Brief.*] On the taxation of the costs of a petition under the Parliamentary Elections Act, 1868, the number of witnesses to be allowed, the length of the briefs and proofs, the number of counsel, and the amount of their fees, and the incidental expenses of a trial, are matters for the master's discretion, subject to the control of the Court where a proper case is shewn for its interference.—The master, on taxation of the petitioner's costs, disallowed fees for consultations during the trial, the Court, in accordance with the *Tamworth Case* (Law Rep. 5 C. P. 173), directed him to review his taxation in that respect.—The master disallowed a moiety of the charges paid to the under-sheriff on the trial: the Court declined to interfere. Tillett *v.* Stracey - - 185

3. —— *Preliminary Expenses — Preparation and Delivery of Briefs — Issuing Subpœnas.*] Upon taxation of the respondent's costs of an election petition, the time prescribed for the delivery of particulars of the alleged bribery, &c, under the rules of Michaelmas Term, 1868, is not to be treated as analogous to the notice of trial in an ordinary action.—On the 14th of December, 1868, a petition was presented against the return of the respondent for the borough of Pembroke, charging bribery, treating, and undue influence; and, on the 26th of February, 1869, notice was given that the trial would take place on the 1st of April,—Thursday in Easter week. On the 22nd of March, an order was obtained for the delivery of particulars of the acts of bribery, &c., intended to be relied on; and, on the 29th, the petitioner gave notice of an application for leave to withdraw his petition. The respondent's briefs were delivered on the 23rd and 27th of March; and several subpœnas were issued before the commencement of the Easter holidays.—On taxation of the respondent's costs, the master disallowed the expenses of the subpœnas and the fees paid to counsel; and he also substantially disallowed the costs of drawing and copying the briefs, and all the expenses of preliminary inquiries, conceiving that, by analogy to the rule which precludes the allowance of costs of preparing for trial before notice of trial given in an ordinary action, these expenses had been prematurely incurred:— The Court ordered a review of the taxation. Hughes *v.* Meyrick 407

"COUNTING HOUSE"—Vote for parliament—Part of a house - - - 252
See Vote for Parliament. 7.

COUNTY COURT—Withdrawal of juror - 129
See Withdrawal of Juror.

COUNTY COURT ACT, 1850 - - 634
See Statutes—13 & 14 Vict. c. 61.

COUNTY COURT APPEAL—*Jurisdiction—Notice of Appeal—Security for Costs—Waiver—County Court Act*, 1850 (13 & 14 *Vict. c.* 61), *ss.* 14, 15, & 16—*County Court Rules*, 1867, *r.* 188.] The provisions of 13 & 14 Vict. c. 61, s. 14, requiring the party appealing from a decision of the county court judge to give a notice of appeal and security for costs within ten days, are not conditions precedent to the jurisdiction of the court to hear the appeal, and they may therefore be waived by the respondent. Park Gate Iron Company *v.* Coates [634

COUNTY COURT JURISDICTION — *Admiralty Jurisdiction—Collision between two Barges—*31 & 32 *Vict. c.* 71, *s.* 3; 32 & 33 *Vict. c.* 51, *s.* 4—*Practice—Prohibition.*] A judge of a county court having admiralty jurisdiction under 31 & 32 Vict. c. 71, and 32 & 33 Vict. c. 51, assumed to exercise such jurisdiction in a case of collision on the Thames between two barges propelled by oars only.—*Held*, on motion for a writ of prohibition to the judge, that the admiralty jurisdiction of the county court in cases of collision was not more extensive than that of the High Court of Admiralty, and as the Court of Admiralty had no jurisdiction over such a collision, that the county court had no such admiralty jurisdiction, and that the prohibition should issue. Everard *v.* Kendall - 428

2. —— 9 & 10 *Vict. c.* 95, *s.* 58—*False Imprisonment — Malicious Prosecution.*] The defendant's wife having given the plaintiff into the custody of a constable on an unfounded charge of felony, the defendant attended at the police-station, and, after having been cautioned by the inspector on duty that he (the inspector) would not incur the responsibility of detaining the plaintiff unless the defendant distinctly charged him with felony and signed the charge-sheet, the defendant signed the charge-sheet, and the plaintiff was detained, and taken next morning before the magistrates, who upon the hearing discharged him.—The plaintiff took out a plaint in a county court for false imprisonment, accompanying it with a notice whereby he expressly disclaimed any cause of action in respect of the malicious prosecution. The judge, erroneously treating the signing of the charge-sheet as the commencement of a "malicious prosecution," ruled that the whole was one continuous transaction, and that the false imprisonment could not be separated from the rest, and consequently that he had no jurisdiction: and he nonsuited the plaintiff:—The Court, on appeal, directed a new trial. Austin *v.* Dowling - - - - - 534

COUNTY COURT PRACTICE—*Summons under* 30 & 31 *Vict. c.* 142, *s.* 2—*Personal Service—Order to proceed.*] 30 & 31 Vict. c. 142, s. 2, enacts that in any action in a county court for the price of goods sold to a defendant, to be dealt with in the way of his trade, the plaintiff may issue a summons in a specified form, and such summons shall be personally served on the defendant, and if the defendant does not give notice of his intention to defend, the plaintiff may, without proof of his claim, upon proof of service of the summons, have judgment against the defendant.—The plaintiff issued a summons under this section. The sum-

COUNTY COURT PRACTICE—*continued.*
mons was personally served upon the defendant, who duly gave notice of his intention to defend, and appeared at the return day to defend the action. The judge ruled that the plaintiff must prove personal service of the summons; the plaintiff was unable to prove the service. The judge then declined to hear the case, and directed a nonsuit:—The Court held that the plaintiff was not bound to prove the personal service, and made an order under 19 & 20 Vict. c. 108, s. 43, directing the judge to proceed to hear and determine the cause. Davis *v.* Pearce - - 435

COUNTY COURT RULES, 1867, r. 188 - 634
See County Court Appeal.

COUNTY VOTE—Parliament - 217, 222, 224, 235
See Vote for Parliament. 1, 2, 3, 4.

COURT—Payment into—Judgment debt - 391
See Payment into Court.

COVENANT—Impossibility of performance 577
See Impossible Covenant.

CREDITORS' DEED—Pleading—Bill of exchange
See Departure. [4

CROSSED CHEQUE—*Principal and Agent—Authority of Agent to receive Money—Payment by Cheque which included several Sums due to different Persons.*] The defendant purchased copyhold land in the plaintiff's manor, and was admitted by C., who had been appointed by the steward of the manor as his deputy to admit the defendant. C. also acted as the defendant's attorney in completing the purchase. Nine days afterwards, the defendant gave C. a cheque for 87*l.* 10*s.* 8*d.*, viz. 78*l.* 15*s.* for the lord's fine, 4*l.* 11*s.* 8*d.* steward's fees, and 4*l.* 4*s.* C.'s own charges as the defendant's solicitor. This cheque was crossed by the defendant, at the request of C., to C.'s bankers. The cheque was duly paid by the defendant's bankers to C.'s bankers, and they retained the money in discharge of a debt due to them by C., who had overdrawn his account. —In an action by the plaintiff against the defendant to obtain payment of the fine due:—*Held* (reversing the judgment of the Common Pleas), that there was evidence for the jury to support a finding that the payment of the fine to C. was a valid payment to the lord. Bridges *v.* Garrett Ex. Ch. 451

CURATE—County vote for parliament - 222
See Vote for Parliament. 2.

CUSTOM OF MARKET—*Principal and Agent—Contract by Brokers.*] The defendant employed the plaintiffs, tallow-brokers in London, to purchase fifty tons of tallow for him in the London market. Having orders to purchase tallow for several other persons, the plaintiffs bought of other dealers sufficient to cover all those orders, interchanging with them bought and sold notes in their own names, without disclosing their principals. By these notes the plaintiffs and their sellers became personally bound to one another for the due performance of the contracts. The plaintiffs then sent the defendant a bought-note signed by themselves as "sworn brokers," in which fifty tons of tallow were described as bought on his account, with the quality, price, &c., but containing no seller's name. This bought-note, except as to quantity, was in the same terms as the contracts between the plaintiffs and their sellers. There was no corresponding sold-note, and no such purchase as represented in the bought-note.—The sellers failed to deliver the tallow to the plaintiffs, who settled the matter in account between themselves and their sellers.—In buying the tallow in this way as an execution of the defendant's order, and in thus settling with their sellers, the plaintiffs acted in accordance with the usage of the market. The defendant was not aware of the usage, or of the way in which the tallow had been bought, until after he received the bought-note. When the defendant became acquainted with the real nature of the transaction, he refused to adopt it, or to accept tallow purchased by the plaintiffs in order to make delivery, and tendered to him in alleged performance of the order.—In an action for refusing to accept the tallow or to indemnify the plaintiffs.—*Held*, By Bovill, C.J., and Montague Smith, J., that the defendant was bound by the usage, although ignorant of its existence, and therefore that he was bound to accept the tallow.—*Held*, by Willes and Keating, JJ., that although a usage may control the mode of performing a contract, it cannot change its intrinsic character, and as the authority given by the defendant to the plaintiffs was to buy for him as brokers, and to sell to him as principals, the defendant was not bound to accept the tallow. Mollett *v.* Robinson - - - 646

DAMAGE: *See* Measure of Damages.

DEFAMATION—Particulars of plea of justification - - - - - 32
See Libel.

DELAY—Marine Insurance—Notice of abandonment - - - - - 341
See Notice of Abandonment.

DEPARTURE—*Composition Deed—Bankruptcy Act*, 1861 (24 & 25 *Vict. c.* 134)—*Bill of Exchange—Sureties—Pleading.*] Declaration by the drawer of a bill of exchange against the acceptor, not stating that it was payable to order.—Plea of a composition deed, containing the usual reservation of the rights of creditors against sureties.—Replication, that the bill was payable to order, and at the time of the making of the composition deed was outstanding in the hands of third parties to whom the plaintiff had since paid the amount of it; and that the plaintiff had not assented to or signed the deed. On demurrer to the replication: —*Held*, first, that it was no departure from the declaration, but, secondly, that the claims of sureties against the principal debtor were not preserved by the deed, and the plaintiff was bound by it under the circumstances mentioned in the replication, which was therefore bad. Hooper *v.* Marshall - - - - 4

DEVISE—Construction - - - 614
See Accruing Shares.

DISCRETION OF JUDGE—Interrogatories 738
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DISCRETION OF MASTER—Taxation of costs
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DOCUMENTS—Inspection—Privileged communications - - - - 146
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DWELLING-HOUSE—Joint occupation—Vote for parliament - - - - 239
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EASEMENT—Fishing-weir—Salmon Fishery Acts
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—— Pew—County vote for parliament - 224
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ENGINE—Fire—Negligence - - 98
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ENGLISH PATENT—Prolongation - 523
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EQUITABLE FREEHOLD—County vote for parliament - - - - 222
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EQUITABLE MORTGAGE—Lease—Agreement
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ESCAPE—Sheriff—Certificate of registration of creditors' deed - - - 414
See Certificate of Registration. 2.
ESTOPPEL—Confession of plea - - 607
See Confession of Plea.
—— Forged acceptance — Payment of former acceptance - - - - 47
See Forged Acceptance.
EVIDENCE—Grant—User—Fishing-weir 657
See Fishing-weir.
—— Inspection of documents—Privileged communications - - - - 146
See Inspection of Documents.
—— Malice—Slander of title - - 122
See Slander of Title.
—— Onus probandi — Innkeeper — Sunday — Traveller - - - 485, 489
See Traveller. 1, 2.
—— Reasonable and probable cause - 640
See Malicious Prosecution.
—— Variation of written contract — Bill of exchange - - - - 37
See Evidence to vary Written Contract.
—— Will—"Nephew"—Latent ambiguity 380
[Ex. Ch. 727
See Evidence to Explain Will.
—— Witness—Costs - - - 518
See Taxation of Costs. 3.

EVIDENCE OF NEGLIGENCE—*Railway Company—Fire from Engine.*] Workmen employed by a railway company in cutting the grass and trimming the hedges bordering the railway, placed the trimmings in heaps near the line, and allowed them to remain there fourteen days, during very hot weather in the month of August. Fire from a passing engine ignited one of these heaps, and burned the hedge, and was thence carried by a high wind across a stubble field and a public road, and burned the goods of the plaintiff in a cottage about 210 yards distant from the railway:—*Held*, by Bovill, C.J., and Keating, J. (Brett, J. dissenting), that there was evidence to go to the jury of negligence on the part of the defendants, although there was no suggestion that the engine was improperly constructed or driven. Smith *v.* The London and South Western Railway Company [98

EVIDENCE OF NEGLIGENCE—*continued.*

2. —— *Carrier of Passengers—Liability for the acts of Others.*] A. agreed to carry B. from M. to L.: the mode of transit provided was that B. should come on to a hulk lying in the harbour at M., and wait till a steamer came and took him to L. On the hulk, close to a ladder down which B. had to pass to reach the steamer, was a large hatchway, which was negligently left unguarded and improperly lighted, and B. fell through it and was injured. The hulk belonged to a third party, and A. had only acquired a right to use it for the purpose of embarking passengers on his steamer. In an action by B. against A. for the injury he sustained:—*Held*, that A. was answerable for all injury occurring through the means of transit being improper, whether it arose from the negligence of his own servants or of other parties who helped to provide the means of transit.—*Held*, also (Brett, J., doubting), that A., having invited B. on to the hulk, was bound to protect him from concealed dangers, and was liable for injury he sustained through the condition of the hatchway, even though it was under the care of others and not his own servants. John *v.* Bacon - 437

3. —— *Negligence—Railway Company—Invitation to Passenger to alight.*] A railway train was drawn up at a station so that the last carriage was opposite to a part of the platform similar in appearance to the rest of it, but on to which persons could not alight, owing to its receding from the line of rails on which the carriage stood so that a space of about four feet intervened between it and the carriage. The train had come finally to rest, but the name of the station had not been called out. A passenger opened the carriage door without calling for assistance to the company's servants, and seeing the platform, and supposing it to be close to the carriage, stepped out, and fell and injured herself. There were lights on the other end of the platform, but not at the part where she got out; and there was evidence that it was the fault of the engine driver that the carriage was not drawn up alongside of that part of the platform on to which passengers could alight with safety. In an action against the railway company for negligence:—*Held*, per Brett, J., that if the jury could reasonably say, upon the facts which were proved and might be properly inferred, that the defendants, having regard to the reasonable safety of passengers, had done something which they ought not to have done, or omitted to do something which they ought to have done, and that the plaintiff had been reasonably careful, the Court could not withdraw the case from them, and that the jury might have reasonably so said from the facts proved, or to be properly inferred, in this case.—Per Montague Smith, J., that the plaintiff was bound to give affirmative evidence of negligence, and that there was no such evidence in this case, as neither the platform, nor the mode of managing the train, were shewn to have been improper, and that, even if there were evidence of negligence, the injury did not flow from it, but from the plaintiff's voluntary act in alighting at the time and place she did.—Per Keating, J., that the case was concluded by authority. The cases shewing, first, that a passenger alighting without an invitation to do so

EVIDENCE OF NEGLIGENCE—*continued.*
does so at his own risk; and, secondly, that the facts proved in this case did not amount to an invitation.—Per Bovill, C.J., that the whole facts of the case were to be looked at together, and that, first, the bringing the train to a stand at a place where the plaintiff would be likely, from the imperfect light and the appearance of the platform, to suppose she might alight, was negligence on the part of the engine driver, the defendants' servant; secondly, the stopping of the train under the particular circumstances was evidence on which a jury might infer that there was an invitation to the plaintiff to alight; and thirdly, if there was such an invitation, there was no necessary imprudence in her alighting in the way she did. Cockle *v.* The London and S. E. Ry. Co. [457

EVIDENCE TO EXPLAIN WILL—*Latent Ambiguity*—"*Nephew.*"] Testator devised property to "my nephew, Joseph Grant," and it appearing that the testator's brother had a son named Joseph Grant, and that the testator's wife's brother also had a son of the same name:—*Held* (affirming the judgment of the Court of Common Pleas), that the description "my nephew" was applicable to both Joseph Grants, and that a latent ambiguity being thus disclosed, parol evidence was admissible to shew which Joseph Grant was meant by the testator. Grant *v.* Grant [380, Ex. Ch. 727

EVIDENCE TO VARY WRITTEN CONTRACT—*Bill of Exchange — Contract of Drawer — Oral Evidence Inadmissible.*] To an action by payee against the drawer of a bill of exchange payable twelve months after date, the defendant pleaded that he drew the bill and delivered it to the plaintiff for the accommodation of the acceptor and as surety for him; that, at the time the defendant so drew and delivered the bill to the plaintiff, it was agreed between the plaintiff and defendant and the acceptor that the acceptor should deposit with the plaintiff certain securities, to be held by the plaintiff as security for the due payment of the bill, and that, in case the bill should not be duly paid, the plaintiff should sell the securities and apply the proceeds in liquidation of the bill, and that, until the plaintiff should have so sold the securities, the defendant should not be liable to be sued on the bill. The plea then went on to aver that the securities were deposited with the plaintiff by the acceptor, but that the plaintiff had not sold but still held them:—*Held* (Willes, J., doubting), that oral evidence of the agreement alleged in the plea was not admissible, inasmuch as it contradicted or varied the express written contract on the face of the bill. Abrey *v.* Crux - 37

EXAMINATION — Married woman—Fines and Recoveries Act - - - 16
See Acknowledgment of Married Woman. 1.

EXCESS OF JURISDICTION—Arbitration - 34
See Jurisdiction of Arbitrator.

EXECUTOR DE SON TORT—*Agent of Rightful Executor.*] A person who deals with the goods of a testator, as agent of the executor, cannot be treated as executor de son tort whether the will has been proved or not.—*Sharland* v. *Mildon* (5 Hare, 469; 15 L. J. (Ch.) 434) explained. Sykes *v.* Sykes - - - - 113

EXECUTOR DE SON TORT—*continued.*

FALSE IMPRISONMENT—County Court jurisdiction - - - - 534
See County Court Jurisdiction. 2.

FINES AND RECOVERIES ACT: *See* Statutes —3 & 4 Will. 4, c. 74.

FIRE—Locomotive—Negligence - - 98
See Evidence of Negligence. 1.

FISH—Fishing-weir—Salmon Fishery Acts 657
See Fishing-weir.

FISHING-WEIR—*Salmon Fishery Act*, 1861 (24 & 25 *Vict. c.* 109)—*Non-navigable River*—12 *Edw.* 4, *c.* 7—17 *Ric.* 2, *c.* 9—*Easement*—*Grant*—*Prescription Act*, 2 & 3 *Wm.* 4, *c.* 71.] The provisions of Magna Charta and of the other early statutes (including 17 Ric. 2, c. 9, and 12 Edw. 4, c. 7), which prohibit weirs, apply only to navigable rivers.—*Rolle* v. *Whyte* (Law Rep. 3 Q. B. 286) followed.—Section 12 of the Salmon Fishery Act, 1861, prohibits the use of fishing mill-dams for the purpose of catching salmon, except such fishing mill-dams "as are lawfully in use at the time of the passing of this Act by virtue of a grant, charter, or immemorial usage."—A fishing mill-dam was erected between 1741 and 1751 in a river above the flow of the tide, and where the river was not navigable. For sixty years before 1861, and as far back as living memory could go, it had been used in substantially the same way as it was used in 1861.—On appeal from the Fishery Commissioners:—*Held*, that the fishing mill-dam was not a public nuisance.—*Held*, further, as a grant may be proved either by production of the grant itself or by evidence of enjoyment consistent only with the existence of such a grant, and from which it may be presumed that the commissioners were bound, on the evidence, to find that the right to the fishing mill-dam existed by grant from all the proprietors whose interests could be affected by the fishing mill-dam, and consequently that the fishing mill-dam was "lawfully in use" at the time of the passing of the Salmon Fishery Act, 1861, "by virtue of a grant," within the meaning of s. 12 of that statute. —*Semble*, that the claim to such a fishing mill-dam is within the Prescription Act, 2 & 3 Wm. 4, c. 71. Leconfield *v.* Lonsdale - - - 657

FIXTURES—Agreement for lease Ex. Ch. 73
See Agreement for Lease.

FOREIGN INDORSEMENT—*Bill of Exchange*—*Code de Commerce, arts.* 137, 138—*Effect of Indorsement in Blank.*] Act 137 of the Code de Commerce requires that the indorsement of a bill or note shall be dated, express the value received, and the name of the indorsee; and art. 138 provides that if the indorsement does not comply with these requisitions, it shall not operate as a transfer of the bill, but only as a procuration.—A bill was drawn by A., in Brussels, on the defendant, in London, and accepted by the defendant in London. It was afterwards indorsed by A. in Brussels, to C., and by C. in Paris to D., and by D. to E., who there indorsed it in blank to the

FOREIGN INDORSEMENT—*continued.*
plaintiff, who resided in London, for the purpose of his receiving the amount on E.'s account.—The Court of Common Pleas held that by the French law the indorsement to the plaintiff gave him no right to sue the acceptor in France, and therefore that the plaintiff could not sue upon it here:—*Held*,—reversing the judgment of the Common Pleas,—that arts. 137, 138, did not prevent the plaintiff from suing the acceptor in France, and therefore that the plaintiff could sue the acceptor in England.—*Trimbey* v. *Vignier* (1 Bing. N. C. 151), discussed. Bradlaugh *v.* De Rin - - - - **Ex. Ch. 473**

FORGED ACCEPTANCE—*Bill of Exchange—Estoppel by Payment of a former Forged Bill.*] In August, 1867, the defendant paid a bill of exchange (of which the plaintiff was the holder) upon which the defendant's name had been written as acceptor without his authority. In an action against him upon another bill similarly accepted, the jury found that the acceptance was not the defendant's signature nor written with his authority, that the forged signature was not adopted by the defendant, that the defendant did not know that the plaintiff was the holder of the former bill, and that he did not lead the plaintiff to believe that the acceptance on the bill sued upon was his:—*Held*, that the fact of the defendant having paid the bill in August, 1867, did not estop him from denying that the bill declared on was accepted by him or with his authority, and that the judge was not bound to tell the jury that, as matter of law, the plaintiff was entitled to a verdict. Morris *v.* Bethell [47

FRAUD—Partnership—Misjoinder of parties
See Misjoinder. [**Ex. Ch. 478**

FRAUDS, STATUTE OF—*Contract or Sale of an Interest in Land—Written Memorandum.*] The plaintiff, being desirous of obtaining a transfer of the lease of a public-house from the defendant, who was a public-house broker, signed an agreement in the following terms:—"Mr. H. (the plaintiff) now informs me he is in possession of 60*l.* cash, and such being the case, I hereby agree to get the lease and everything, for such sum of 60*l.* cash." The defendant had no interest in the public-house himself:—*Held*, first (Keating, J., dubitante), that the contract required to be in writing under the 4th section of the Statute of Frauds.—Secondly, that the agreement was sufficiently definite to constitute a good memorandum in writing, and that the meaning of the word "everything" might be explained by a previous memorandum in writing; also that parol evidence was admissible to shew what the lease was to which the agreement referred. Horsey *v.* Graham - - - - - - - 9

—— Contract by telegram - - - 295
See Misrepresentation of Authority.

FREEHOLD — Benefice — County vote for parliament - - - - - 217
See Vote for Parliament. 1.

FREIGHT—Insurance—Inception of risk [**Ex. Ch. 155**
See "At and From" a Port.

FREIGHT—*continued.*
—— Insurance—Suing and labouring clause **397**
See Suing and Labouring Clause.

—— Insurance—Notice of abandonment [**Ex. Ch. 341**
See Notice of Abandonment.

"GOOD JURY"—*Taxation of Costs—Writ of Inquiry—Fees.*] A judge's order was obtained by the plaintiffs for a "good jury," on an inquiry before the Secondary, in an action against a railway company for negligence, and the sheriff, in accordance with the uniform practice since the passing of the 6 Geo. 4, c. 50, returned a jury selected from the list of special jurors. They were paid each one guinea; and the master, on taxation, allowed the payment:—*Held*, that such payment was reasonable and sanctioned by practice, and that it was properly allowed by the master. Vickery *v.* The London, B. and S. C. R. Co. **165**

"GOOD SAFETY" — *Marine Insurance — Construction of Policy—"Thirty Days after Arrival"—Mooring at Anchor—Termination of Risk.*] By a Lloyd's policy on ship, the risk was described in writing to be "at and from London to Calcutta, and for thirty days after arrival," and then followed the usual printed words, "upon the said ship, &c., until she hath moored at anchor twenty-four hours in good safety."—After having sustained damage at sea to such an extent as to require constant pumping to keep her afloat, the vessel arrived at Calcutta, and was safely moored there on the 28th of October, 1866. Her cargo was unloaded in safety by the 8th of November. It was necessary to continue the pumping during the discharge of the cargo until she was much lightened. On the 12th she was taken from her moorings to a dry-dock for survey and repair, and was there destroyed by an accidental fire on the 5th of December:—*Held*, that, as the vessel remained at her moorings more than twenty-four hours as a ship, though damaged, and not as a mere wreck, she had been moored "twenty-four hours in good safety," and as her destruction did not take place until after thirty days from that time, that the risk had terminated at the time of the loss.—Whether the thirty days were to be reckoned from the arrival at Calcutta or from the expiration of the twenty-four hours after she had been moored in good safety, *quære?* Lidgett *v.* Secretan - - - - - - **190**

GRANT—Evidence—Fishing-weir—Salmon Fishing Act - - - - - **657**
See Fishing-weir.

GUARANTEE—Continuing—Consideration **65**
See Continuing Guarantee.

—— Renewal—Surrounding circumstances **595**
See Renewal of Guarantee.

ILLEGAL CONTRACT — *Company—Winding-up Acts—Maintenance.*] An agreement by a shareholder in a company that is being compulsorily wound up that, in consideration of a pecuniary equivalent, he will endeavour to postpone the making of a call, or will support the claim of a creditor, is illegal, as being contrary to the policy of the Winding-up Acts.—A. and B. were shareholders in a company then being compulsorily wound up under the provisions of the Com-

ILLEGAL CONTRACT—*continued.*

panies Act, 1862, and B. was also a creditor of the company. An agreement was entered into between them, by which A. agreed to use his influence to obtain the postponement of a call then about to be made, and to support B.'s claim, and B. in consideration thereof agreed to pay all calls made on A.'s shares. In an action by A. against B. on this agreement for not paying certain calls made on his shares, B. pleaded that the agreement was made without the knowledge of the Court of Chancery, or the other shareholders or creditors, and with intent to obtain a postponement of the call and payment of dividends on the whole of B.'s debt to the prejudice of the other shareholders and creditors, though A. knew that B's claim was disputed, and believed that only a portion of it was due:—*Held*, that the plea was good as shewing that the agreement was contrary to the policy of the Winding-up Acts, and therefore void.—*Semble*, per Willes, J., that the agreement to support B.'s claim was also void as being within the spirit of the law against maintenance. Elliott *v.* Richardson - **744**

ILLEGALITY—Contract—Winding-up company. *See* Illegal Contract. [**744**

IMPLIED AUTHORITY—*Master and Servant—Principal and Agent—Responsibility of a Railway Company for the Acts of their Servants.*] A foreman porter in the service of a railway company, who, in the absence of the station-master, is in charge of a station, has no implied authority to give in charge a person whom he suspects to be stealing the company's property; and, if he gives in charge on such suspicion an innocent person, the company are not liable. Edwards *v.* The London and N. W. R. Co. - - - **445**

IMPOSSIBLE COVENANT—*Mining Lease—Impossibility of Performance at Time of entering into Covenant.*] The plaintiff, in consideration of the rent, &c., demised by deed to the defendant all the veins, pits, &c., of clay which were or might be found upon or under certain lands described, with liberty to enter and search for, dig, and carry away all such clay, making satisfaction to tenants for surface damage, To hold the said veins, pits, &c., of clay for twelve years from a given day, and to take the clay so authorized to be worked to his own use, Yielding and paying therefor during the term, in respect of all pipe and potter's clay being to be got or obtained from or under the land, 2*s.* 6*d.* per ton. Covenants for compensation for damage to the land, and for restoring the surface, keeping accounts of clay raised, &c.,—a covenant to work and make trials for clay according to the best and most improved method of working clay-pits, and the usual course of proceeding in such works with effect,—and a covenant that the defendant would dig and remove from the land an aggregate amount of not less than 1000 tons, nor more than 2000 tons of pipe or potter's clay in each year of the term. There was no reservation of a minimum rent to be paid in the event of clay not being found or raised.—In an action upon this deed, one of the breaches assigned was that the defendant had not dug an aggregate amount of not less than 1000 tons of pipe and potter's clay in each year of the demise that had elapsed.—Plea, on equitable grounds, that the defendant could not at any time during the term dig an aggregate amount of not less than 1000 tons of pipe and potter's clay in each year, because there was not at the time of the demise, nor at any time since, so much clay under the land in question, and the performance of the covenant was impossible, and such impossibility was, at the time of making the covenant, unknown to the defendant, and he had no reasonable means of ascertaining it:—*Held*, on demurrer, that the plea was an answer to the breach, as the Court were of opinion on the construction of the deed, that it was the intention of the parties that the covenant to dig not less than 1000 tons of clay in each year should not take effect unless there was clay to that amount in the lands demised. Lord Clifford *v.* Watts **577**

IMPOSSIBLE COVENANT—*continued.*

INDORSEMENT — Foreign — Conflict of law. *See* Foreign Indorsement. [**Ex. Ch. 473**

INNKEEPER—Traveller—Sunday - **435, 489**
See Traveller. 1, 2.

INSPECTION OF DOCUMENTS—*Common Law Procedure Act*, 1854 (17 & 18 *Vict. c.* 125), *s.* 50—14 & 15 *Vict. c.* 99, *s.* 6—*Privileged Communications—Evidence—Practice.*] The defendants, in order to ascertain whether or not they ought to yield to a claim by the plaintiffs for damages for personal injuries alleged to have been sustained by the plaintiffs in an accident on the defendants' line, sent their medical officer before litigation commenced or was formally threatened, to report to them upon the nature of the plaintiff's injuries:—*Held*, that the reports of the medical officer were privileged, and that the plaintiffs were therefore not entitled to have inspection of them.—*Baker* v. *London and South Western Ry. Co.* (Law Rep. 3 Q. B. 91) distinguished. Cossey *v.* The London, B. and S. Co. R. Co. - - **146**

INSURABLE INTEREST—Marine insurance—Inception of risk - - **Ex. Ch. 155**
See "At and from" a Port.

INSURANCE: *See* Marine Insurance.

INSURANCE SOCIETY—Right of manager to sue members - - - - **568**
See Mutual Insurance Society.

INTEREST—Marine insurance—Inception of risk. [**Ex. Ch. 155**
See "At and from" a Port.

—— Payment into Court—Judgment debt **391**
See Payment into Court.

INTERROGATORIES — Criminating questions—Discretion of judge - - **738**
See Interrogatories, Criminating.

—— Interrogatories by defendant - - **107**
See Interrogatories by Defendant.

INTERROGATORIES BY DEFENDANT—*Practice—C. L. Pro. Act*, 1854 (17 & 18 *Vict. c.* 125), *s.* 51.] Barley was consigned by A. to B., and was delivered by the ship-owners to B. without production of the bill of lading. The plaintiffs (who were B.'s bankers), as indorsees of the bill of lading from him, three months afterwards (B. having in the meantime become bankrupt) brought trover against the ship-owners. Upon an affidavit suggesting that the bill of lading was indorsed to the plaintiffs after the delivery of the barley to B.,

or that they, having the bill of lading in their possession, knowingly suffered the ship-owners to deliver the barley to B.,—The Court allowed interrogatories under s. 51 of the Common Law Procedure Act, 1854, to be administered to the plaintiffs as to the time when and the circumstances under which the indorsement of the bill of lading to them took place. *Finney* v. *Forwood* (Law Rep. 1 Ex. 6) distinguished. The Derby Commercial Bank (Limited) *v.* Lumsden 107

INTERROGATORIES, CRIMINATING — *Libel — Special circumstances — Discretion of Judge at Chambers*] To an action for libel, in sending to the *Times* newspaper a libellous extract from a letter, the defendant pleaded the general issue and a justification, Blackburn, J., upon the usual affidavit, allowed the plaintiffs to administer to the defendant the following interrogatory: "Did you write and send to the *Times*, for publication, a letter signed Z., accompanied by what purported to be an extract from the letter from a Halifax merchant?" The defendant had obtained a commission to Nova Scotia to examine witnesses upon an affidavit which stated that the extract was from a letter he had received from a person in Nova Scotia with whom he had since communicated, and on whose information, believing the statement to be true, he had pleaded a justification, in support of which it was necessary to examine witnesses in Nova Scotia. This affidavit was not before the judge, but it did not appear whether the facts had or had not been stated to him. On a motion to set aside the order allowing the interrogatory:—*Held*, that whether such an interrogatory should be allowed or not was a matter for the discretion of the judge, with which the Court would not interfere unless he was shewn to have been clearly wrong; and that though some special circumstances should be shewn to the judge before he would be justified in allowing such an interrogatory, yet the circumstances in the present case appeared to be sufficiently special, and were, at any rate, not shewn not to be so. Inman *v.* Jenkins - - - - - 738

INVITATION—Passengers—Railway Company
See Evidence of Negligence. 2. [437

JOINDER OF PARTIES—Pleading Ex. Ch. 478
See Misjoinder.

JOINT OCCUPATION — Vote for parliament — Dwelling-house - - - 239
See Vote for Parliament. 5.

JUDGE—Discretion—Interrogatories - 738
See Interrogatories, Criminating.

JUDGMENT-DEBT— Payment into court - 391
See Payment into Court.

JURISDICTION — Appeal from county court — Notice—Security—Waiver
See County Court Appeal. [634
—— County court—Malicious prosecution 534
See County Court Jurisdiction. 2.
—— County court—Admiralty - - 428
See County Court Jurisdiction. 1.

JURISDICTION OF ARBITRATOR — *Award — Excess of Jurisdiction—Ambiguity and Uncertainty.*] Matters in difference between A. and B. were by agreement referred to arbitrators or an umpire, the costs of the submission, reference, and award to be in their or his discretion. A. claimed about 30*l.*; B. denied that he was indebted in any sum. The arbitrators having differed, the umpire made his award in favour of A. for 6*l.* 5*s.* 2*d.*, but directed him to pay B. his costs of the submission, and of the reference, and of the award, amounting to 13*l.* 4*s.* 3*d.*:—*Held*, that the fact of the umpire having awarded that the successful party should pay these costs was no ground for setting his award aside. *Semble*, that there was such ambiguity in the award as to what costs were intended, as would have induced the Court to send the matter back to the umpire if asked to do so. Fearon *v.* Flinn - - - - 34

JUROR—Withdrawal—Practice - - 129
See Withdrawal of Juror.

JUSTICES—Appeal—Costs - - - 489
See Traveller. 2.

JUSTIFICATION—Libel—Pleading—Particulars
See Libel. 32

LAND—Contract for sale - - - 9
See Frauds, Statute of.
—— Notice to purchase by railway company 553
See Notice to Treat.

LANDLORD AND TENANT—Covenant—Impossibility of performance - - 577
See Impossible Covenant.
—— Mortgage—Payment of rent before it is due [589
See Payment of Rent in Advance.
—— Termination of tenancy - - 334
See Termination of Tenancy.
—— Vote for parliament—Occupation as tenant
See Vote for Parliament. 6. [246

LANDS CLAUSES ACT, 1845 - - -
See Statutes—8 & 9 Vict. c. 18.

LATENT AMBIGUITY—Will—"Nephew" [380, Ex. Ch. 727
See Evidence to Explain Will.

LEASE—Agreement—Equitable mortgage
See Agreement for Lease. [Ex. Ch. 73
—— Covenant impossible of performance 577
See Impossible Covenant.

LETTERS PATENT—Prolongation - - 523
See Prolongation of Patent.

LIABILITY—Tolls—Leaving carriage on highway - - - - - 497
See Avoiding Tolls.

LIBEL—*General Plea of Justification — Particulars.*] In an action for a libel, the defendant pleaded that the defamatory matter in the declaration complained of was and is true in substance and in fact;—The Court ordered him to give particulars of the facts and matters he relied on to justify the libel, or, in default, that the plea should be struck out. Jones *v.* Bewicke - - 32
—— Interrogatories - - - - 738
See Interrogatories, Criminating.

LICENCE—Revocation—Landlord and tenant
See Termination of Tenancy. [334

LIEN—Mersey Docks Act, 1858—Construction
See Mersey Docks Act, 1858. [19

LOCOMOTIVE—Fire—Negligence - - 98
See Evidence of Negligence. 1.

LODGER—Vote for parliament—Joint occupation of dwelling-house - - - 239
See Vote for Parliament. 5.

LOSS OF FREIGHT—Marine insurance — Suing and labouring clause - - 397
See Suing and Labouring Clause.

MAINTENANCE—Illegal contract - - 744
See Illegal Contract.

MALICIOUS PROSECUTION—*Master and Servant —Railway Company — Reasonable and Probable Cause.*] One of the defendants' servants, a constable, after the conclusion of a scuffle in a station-yard between some of the defendants' servants and other persons, wrongfully gave A. into custody on a charge of assaulting the defendants' servants.—By the defendants' regulations their constables were authorized to take into custody any one they saw committing an assault upon another in any of the stations, and for the purpose of putting an end to any fight or affray; but they were directed to use this power with extreme caution, and not if the fight or affray was at an end before they interposed:—*Held*, that the defendants were not liable for the act of their servant, as the Court drew the inference of fact that the constable in giving A. into custody was not acting within the scope of his employment.—The defendants subsequently prosecuted A. unsuccessfully. In an action for malicious prosecution, A. put in evidence the depositions of the defendants' witnesses before the magistrate, which were such as, if previously known to the defendants, would have given them reasonable cause for entering on the proceedings; but no evidence was given, either by the defendants or A., to show whether the witnesses had previously made these statements to the defendants:—*Held*, that as it is usual to interrogate witnesses as to their evidence before taking such proceedings, and as the burden of proof that there was no reasonable or probable cause lay upon the plaintiff, it must be taken that the defendants had reasonable cause for prosecuting the plaintiff.—B. refused to leave a station-yard of the defendants, and a struggle thereupon ensued between B. and the defendants' servants, during which B. was wrongfully given in charge by a constable of the defendants,' employed under the above rule.—*Held*, that there was evidence for the jury that the constable was acting within the scope of his employment. Walker *v.* South Eastern Ry. Co. Smith *v.* Same - - 640
—— County court—Jurisdiction - - 534
See County Court Jurisdiction. 2.

MARINE INSURANCE—"At and from" a port—Inception of risk - - Ex. Ch. 155
See "At and From" a Port.
—— Chartered Freight—Notice of abandonment
See Notice of Abandonmet. [341
—— "Good safety"—"Thirty days after arrival"
See "Good Safety." [190
—— Mutual insurance club—Right of manager to sue members - - - 568
See Mutual Insurance Society.
—— Suing and labouring clause - - 397
See Suing and Labouring Clause.

MARKET—Custom—Agent - - - 646
See Custom of Market.

MARRIED WOMAN — Acknowledgment—Fines and Recoveries Act - - 16, 424
See Acknowledgment by Married Woman. 1, 2.

MASTER AND SERVANT—Implied authority
See Implied Authority. [445
—— Railway company - - - 640
See Malicious Prosecution,

MASTER'S DISCRETION—Taxation of costs 135,
See Taxation of Costs. 1, 2, 3. [141, 518

MEASURE OF DAMAGES—Agent—Misrepresentation—Authority - - - 295
See Misrepresentation of Authority.

MERSEY DOCKS ACT, 1858 — *Construction — Wreck—Lien of the Board on Cargo saved by them.*] The 59th section of the Mersey Dock Acts Consolidation Act, 1858 (21 & 22 Vict. c. xcii.), impowers the defendants to raise, destroy, &c., any "wrecks of vessels and any vessels that shall be sunk in any dock, &c., within the port of Liverpool," which may be an obstruction to the navigation, and, in case the master or owner of "such vessel or other obstruction" shall neglect to pay the charge of removing "the same" for the space of three days after demand, to sell "the same," and out of the proceeds retain the expense incurred in raising, destroying, &c., "such wrecks or other obstructions," rendering the overplus to the person entitled to the same.—The ship *Swansea* came into collision with another vessel and was sunk in the Mersey, within the port of Liverpool, having on board copper ore and other goods belonging to the plaintiffs. The defendants took possession of the wreck, which obstructed the navigation, and claimed the exclusive right of dealing with ship and cargo. A portion of the cargo (worth about 1200*l.*) was raised by them from the wreck, at a cost of 294*l.* 14*s.*, and they ultimately blew up and destroyed the hull of the vessel and the rest of the cargo. The expense incurred by them in removing the obstruction caused by ship and cargo was about 4500*l.*:—*Held*, that the defendants were not entitled to detain the plaintiffs' goods to indemnify themselves for the costs incurred in the destruction of the ship, of which the plaintiffs were not the owners. Vivian *v.* The Mersey Docks and Harbour Board - 19

METROPOLITAN BUILDING ACT, 1855 (18 & 19 *Vict. c.* 122)—*Duty of protecting Rooms exposed by the outer Walls being pulled down.*] A building owner who pulls down a party-wall under the authority of the Metropolitan Building Act, 1855, is not bound to protect by a hoarding or otherwise the rooms of the adjoining owner which are left exposed to the weather during the time that the wall is being pulled down and rebuilt. Thompson *v.* Hill - - - - - - 564

MILEAGE RATE — *Carriers — Interpretation of Statute*—9 & 10 *Vict. c. cxxxi., s.* 13.] A railway company received goods for carriage from S. to L. In the course of the journey they carried the goods from a point C. on the line to N., and back again to C., and thence on to L., but this was their usual and a reasonable way of carrying goods, there being a large goods-station at N.—By the Act of incorporation of the company it was provided that they should not charge for the carriage of goods of the kind in question more

MILEAGE RATE—*continued.*
than 3*d.* per ton per mile:—*Held*, that the company were entitled to charge 3*d.* per ton per mile in respect of the distance from C. to N. and back, in addition to the distance in the direct line from S. to L. Myers *v.* The London and S. W. Ry. Co. - - - - - - - 1

MINING LEASE—Covenant impossible of performance - - - - 577
See Impossible Covenant.

MISJOINDER—*Partnership—Fraudulent Dealing with Partnership Property—Bankrupt—Disaffirmance by Assignees.*] B. & S. traded in partnership, and were possessed of bills of exchange, which S. in fraud of the partnership, indorsed and delivered to the defendant in satisfaction of a private debt of his own, the defendant being cognizant of the fraud. S. became bankrupt. The defendant having realized the bills, the assignees of S., jointly with B., without having previously done anything to disaffirm the transaction, brought an action against the defendant for the wrongful conversion, and for money received to their use:—*Held*,—affirming the judgment of the Common Pleas,—without deciding whether the plaintiffs could maintain an action for conversion, that they were entitled to recover under the counts for money received to their use. Heilbut *v.* Nevill - Ex. Ch. 478

MISREPRESENTATION OF AUTHORITY—*Principal and Agent—Measure of Damages—Contract by Telegram—Statute of Frauds.*] F. and four others were joint owners of an estate, which they were desirous of selling, and had advertised for sale. F., representing that he had authority from his co-owners to do so, contracted to sell the estate to the plaintiff, and sent him an abstract of title. The co-owners repudiated the contract, and concluded a sale at a higher price to another person. The plaintiff, nevertheless, conceiving that the four owners had bound themselves by the terms of the advertisement which they had issued, sued them for breach of contract, and continued his action after they had all sworn in answer to interrogatories that F. had no authority to make the contract, and was nonsuited. In an action against F. for this misrepresentation of authority:—*Held*, that the proper measure of damages was: 1, the costs of investigating the title; 2, the costs incurred and paid by the plaintiff in the action against the four, down to the time when the answers to the interrogatories had been received and considered by the plaintiff's legal advisers; 3, the difference between the contract price and the market price of the estate, and that the sum for which the estate was afterwards sold, was primâ facie evidence of the latter. But that the plaintiff could not recover for the loss on the resale of horses, &c., bought for the purpose of stocking the land, without notice to F., and before the title had been investigated, or possession of the land given.—The plaintiff, by letter, offered to buy an estate for a given sum. The defendant answered by telegram, "Your offer for the L. estate is accepted." The instructions for the message were signed by the defendant; but the telegram received by the plaintiff merely contained the names of the sender and receiver, written by the company's clerk in the usual printed form:—*Semble*, that this was a sufficient signature by the defendant, under the Statute of Frauds, to render

MISREPRESENTATION OF AUTHORITY—*cont.*
him liable to be charged on the contract. Godwin *v.* Francis - - - - - 295

MORTGAGE—Payment of rent to mortgagor before it is due - - - 589
See Payment of Rent in Advance.

MUTUAL INSURANCE SOCIETY—*Club—Right of Manager to sue for Premiums and Calls.*] An association of ship-owners was formed for the mutual assurance of ships belonging to its members. The regulations, subject to which the policies were effected, provided for the creation of a general fund by payment of premiums, &c., by the several members, and, when these should be found insufficient, by payment of contributions in the shape of a per centage on the sums insured; and a manager (not a member of the association) was appointed by a power of attorney which authorized him to sign policies for and in the names of the members of the association, and "in their several and respective names," &c., to demand and sue for all sums which should become due and payable for premiums and contributions from them respectively:—*Held*, that the manager could not maintain an action against a member for premiums due from such member or for moneys paid by the manager out of the funds of the association in respect of such member's share of losses due to other members. Gray *v.* Pearson 568

NAVAL KNIGHTS—Windsor—Vote for parliament - - - - 262
See Vote for Parliament. 8.

NAVIGABLE RIVER — Fishing-weir — Salmon Fishery Acts - - - 657
See Fishing-weir.

NEGLIGENCE—Evidence - - 98, 437, 457
See Evidence of Negligence. 1, 2, 3.

"NEPHEW"—Will—Extrinsic evidence 380 [Ex. Ch. 727
See Evidence to Explain Will.

NOTICE OF ABANDONMENT—*Marine Insurance—Chartered Freight—Unreasonable Delay.*] The ship *Sir William Eyre*, then on her outward voyage to New Zealand with cargo and government emigrants for Otago, was chartered by one De Mattos to proceed thence to Calcutta, and there load a cargo for London. The plaintiffs, who were mortgagees of the ship, caused a policy to be effected on her for 4000*l.*, "at and from the Clyde to Southland (N. Z.), while there, and thence to Otago (N. Z.), and for thirty days in port there after arrival," and the interest insured was declared to be "homeward chartered freight." The vessel arrived at Bluff Harbour, Southland, on the 23rd of April, 1863, where she got aground, and the captain, finding a difficulty in getting her off, sent on the passengers and their luggage at the expense of the ship to Dunedin. She sustained some damage, but was got off, and grounded again twice, and did not finally get clear of the ground until the 1st of July, when she left for Port Chalmers, the port of Dunedin, where she arrived on the 4th. A survey was held on her at Bluff Harbour, and others at Port Chalmers, the result of which disclosed considerable damage, but not sufficient in the opinion of the surveyors to prevent her, after some repairs which they indicated, from proceeding to Calcutta, which she

NOTICE OF ABANDONMENT—*continued.*
did, and there the surveyors recommended that she should undergo further examination. She arrived at Calcutta on the 7th of June, and it was then discovered that the damage she had sustained at Bluff Harbour was so great that to repair her so as to enable her to proceed on the chartered voyage would cost more than her value when repaired, plus the homeward freight. The charterer also it was found had stopped payment, and his agents at Calcutta refused to load the ship. The plaintiffs, as soon as they became aware of the state of the vessel, viz. on the 2nd of August, 4864, gave notice of abandonment to the underwriters both on ship and on cargo.—The expenses incurred in consequence of the vessel having grounded at Bluff Harbour, and also in consequence of proceedings against the master for breaches of the Passengers Act (18 & 19 Vict. c. 119), and for damages to and short delivery of cargo, having exhausted all his available funds, and it being found impossible to raise money on bottomry save at a ruinous price, and the plaintiff's agents in New Zealand being unwilling to make advances to the captain without specific instructions from the plaintiffs, the vessel was detained there for want of means to do the repairs necessary to enable her to proceed to Calcutta, until the 14th of April, 1864. But for these circumstances, the sum received by the captain in New Zealand for freight and passage would have amply sufficed for all the ship's disbursements;—*Held*, by the majority of the Exchequer Chamber (Cockburn, C.J., Kelly, C.B., Channell, B., and Lush, J.),—reversing the decision of the Court of Common Pleas,—that, the ship having by a peril insured against been incapacitated from earning the chartered freight, and the assured not being under any obligation to repair her in order to earn such freight, but, on the contrary, being justified as prudent men in abandoning her, the loss of the freight was a loss by a peril insured against; that the assured had not by the abandonment of the ship lost their right to claim for a total loss against the underwriters on freight; and that, under the circumstances, the delay in giving notice of abandonment was sufficiently accounted for, and the notice, if notice was necessary, was not too late.—*Held*, by Cleasby, B., that the plaintiff's interest in and power of earning the chartered freight having been destroyed by their own act of abandoning the ship, and not by the perils which caused that election, they were not entitled to recover for an actual loss of freight by the constructive total loss of the ship; that, assuming that they could be entitled to recover, notice of abandonment was necessary; and that, the delay in giving such notice having been caused by the default of the plaintiffs or their agents, or of the captain, it could not be justified as against the underwriters, and that the notice was too late. Potter *v.* Rankin - **Ex. Ch. 341**

NOTICE OF APPEAL—County Court—Condition precedent—Waiver - - 634
See County Court Appeal.

—— Revising Barrister - - - 224
See Vote for Parliament. 3.

NOTICE OF OBJECTION—Borough vote for parliament - - - - 291
See Vote for Parliament. 10.

NOTICE TO TREAT—*Railway Company—Notice of Intention to Purchase Land—Lands Clauses Act*, 1845 (8 & 9 *Vict. c.* 18), *s.* 16.] It is no answer to an action against a railway company for not issuing their warrant under s. 39 of the Lands Clauses Act, 1845, for the assessment of compensation for land which they have given notice of their intention to purchase, that the undertaking was intended to be carried into effect by means of a certain capital, and that the whole amount has not been subscribed, as required by s. 16,—the notice to treat not necessarily being an exercise of the powers of the Act "in relation to the compulsory taking of land." Guest *v.* The Poole and Bournemouth Ry. Co. - - - 553

OBJECTION—Notice—Borough vote for parliament - - - - 291
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OCCUPATION—Vote for parliament—Corporation—Canon - - - - 282
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—— Vote for parliament—"Counting-house"
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—— Vote for parliament—Joint occupation of dwelling-house - - - 239
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—— Vote for parliament—Owner or Tenant Corporation - - - - 262
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OFFICE—Acceptance of new, by principal—Suretyship - - - 201
See Surety for Rate Collector.

ONUS PROBANDI—Innkeeper—Sunday—Traveller - - - 485, 489
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OVERSEER—Collector of Rates—Suretyship 201
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OWNER—Vote for parliament—Occupation—Corporation - - - 262
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PARLIAMENTARY ELECTIONS ACT, 1868
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PARTNER—Renewal of guarantee—Surrounding circumstances - - - 595
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PARTNERSHIP—Misjoinder of parties
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PASSENGER—Carrier—Negligence - 437
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PATENT—Prolongation - - - 523
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PATENT LAW AMENDMENT ACT, 1852 523
See Statutes—15 & 16 Vict. c. 83.
PAYMENT—Agent—Crossed cheque Ex. Ch. 451
See Crossed Cheque.
—— Forged acceptance—Estoppel - 47
See Forged Acceptance.
PAYMENT INTO COURT—*Practice—Judgment-Debt—Interest under* 1 & 2 *Vict. c.* 110, *s.* 17—*Entering Satisfaction.*] On the 9th of September, 1869, judgment was signed for 28,850*l.* (awarded by an arbitrator in a cause) and costs; on the 26th of October an order was made to stay proceedings until the fifth day of Michaelmas Term, to give the defendants an opportunity to move to set aside the award, they bringing the 28,850*l.* into court to abide the event; and on the 8th of November the motion was made, but no rule granted,—of which the plaintiff had notice. Some delay occurred in the taxation of the plaintiff's costs, a review having been ordered at the plaintiff's instance, and the amount was not ultimately settled until the 29th of January, 1870; and on the 2nd of February the money was paid out of court to the plaintiff under a judge's order upon the defendants' summons, and the costs, with interest upon the judgment down to the 8th of November, 1869, were tendered to his attorneys. They, however, claimed interest down to the 2nd of February, 1870:—*Held*, that the plaintiff was only entitled to interest down to the 8th of November, 1869, inasmuch as he might at any time after that day have taken the money out of court; and the Court ordered satisfaction to be entered on the roll. Sinclair *v.* the Great Eastern Railway Company 391
PAYMENT OF RENT IN ADVANCE—*Landlord and Tenant—Mortgage—Payment of Rent to Mortgagor before it becomes due—*4 *Anne, c.* 16.] B., having leased his land to the plaintiff at a rent payable quarterly, subsequently mortgaged the land to the defendants, who allowed B. to remain in receipt of the rent. Subsequently to the mortgage, B. applied to the plaintiff, who was not aware of the mortgage, to pay him a year's rent in advance, and the plaintiff did so. After the payment, and before the rent had become due, the defendants gave notice to the plaintiff to pay the rent to them, and the plaintiff refusing to pay it, the defendants distrained for it:—*Held*, in an action for an illegal distress, that payment of the rent before it became due was not a good payment as against the defendants, the mortgagees, and that the plaintiff was still liable to pay them the rent. De Nicholls *v.* Saunders - - - - - 589
PERPETUAL CURATE—County vote for parliament - - - - 222
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—— Change of venue - - - 119
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—— County Court—Service of summons under 30 & 31 Vict. c. 142 - - 435
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—— County Court—Prohibition - - 428
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—— Interrogatories - - - 107, 738
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—— Joinder of parties - - Ex. Ch. 478
See Misjoinder.
—— Neglect to plead creditors' deed - 414
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—— Withdrawal of juror - - - 129
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PRIVILEGED COMMUNICATION—Inspection of documents - - - - 146
See Inspection of Documents.

PROHIBITION—County Court - - 428
See County Court Jurisdiction. 1.

PROLONGATION OF PATENT—*Patent Law—English and Scotch Patents—Patent Law Amendment Act*, 1852—15 & 16 *Vict. c.* 83—16 & 17 *Vict. c.* 115—*Letters Patent.*] Separate patents were granted for an invention in England, Scotland, and Ireland, previous to the passing of the Patent Law Amendment Act, 1852 (15 & 16 Vict. c. 83), for terms expiring at the same date. By that Act, and its amending Act, 16 & 17 Vict. c. 115, it was provided that the letters patent granted for the prolongation of a patent should for the future be sealed with the great seal of the United Kingdom, and should be in force in the whole of the United Kingdom. Letters patent were subsequently granted, sealed with the great seal of the United Kingdom, prolonging for a term of five years from their expiration the privileges granted by the three patents above mentioned:—*Held*, that the effect was the same as if the three patents had been separately prolonged, and that the fact of one of the original patents being void for want of novelty would not prevent the letters patent being valid as a prolongation of the other patents. Bovill *v.* Finch - - - - - 523

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QUALIFICATION—Borough vote for parliament—Corporation - - - 282
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RAILWAY—Facilities for receiving, forwarding, and delivering traffic - - 622
See Railway and Canal Traffic Act, 1854.

RAILWAY AND CANAL TRAFFIC ACT, 1854 (17 & 18 *Vict. c.* 31), *s.* 3—*Land let by Railway Company for storing Coal—Facilities for receiving, forwarding, and delivering Traffic.*] A railway company, having land adjoining one of their stations, let the whole of it to P., a coal merchant, for the purpose of storing coal brought by their line. P. did not require or actually use the whole of the land for this purpose. W., another coal merchant, applied to the company to provide him on similar terms with land for storing coal, or to let to him the part of the land not actually used by P. The company refused to do so. W. then applied to the Court under the Railway and Canal Traffic Act, 1854, s. 3, for an order compelling the company to desist from allowing P. to store coals on the land, or to give similar facilities to him:—*Held*,—by Bovill, C.J., and Keating, J.,—that a means of storing coal at the station to which it is sent being a necessary facility for the proper carrying on of the coal trade, the company had no right to grant greater facilities to P. than to W., and that they ought to be restrained from doing so:—*Held*,—by Montague Smith and Brett, JJ.,—that the Railway and Canal Traffic Act only relates to facilities in the receiving, forwarding, and delivering traffic, and that the Court has no jurisdiction to interfere with matters

RAILWAY AND CANAL TRAFFIC ACT, 1854—*continued.*
not relating to these, and that facilities for storing coal after it has been delivered to the consignee do not relate to the receiving, forwarding, or delivering of traffic, and are not therefore under the control of the Court. West *v.* The London and N. W. Ry. Co. - - - - 622

RAILWAY COMPANY—Evidence of negligence
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—— Implied authority to servants - 445
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—— Mileage rate - - - - 1
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REGISTRATION—Creditors' deed—Certificate—Sheriff - - - - 414
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REGISTRATION OF CERTIFICATE—Deed under Bankruptcy Act, 1861 - -
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—— 22 & 23 Trin. Term, 1853 - - 607
See Confession of Plea.
—— M. T., 1869, under Debtors Act, 1869, and T. T., 1870, as to allowance for more than one counsel on taxation of costs on writ of inquiry.—*See* Law Rep. 5 Q. B. 669.

RELEASE—Condition subsequent - - 607
See Confession of Plea.

RENEWAL OF GUARANTEE—*Construction with reference to surrounding Circumstances—Partner—Broker at Lloyd's.*] J. S. being desirous of carrying on business as an insurance-broker at Lloyd's, which by the rules of that association he could only do on being admitted a subscriber and giving security to the committee of Lloyd's, the defendant and another person, in March, 1858, addressed the following letter to the committee:—"We each of us hereby hold ourselves responsible to the extent of 750*l.* for any debts that J. S. (who has applied to your committee to be admitted a subscriber of your institution, to enable him to act as an insurance-broker) may contract, in his capacity of such broker," for two years from this date, and till notice. J. S. was thereupon admitted and acted as a broker on his own sole account until January, 1860, when he took H. into partnership, with the knowledge of his sureties.—In April, 1860, the defendant and his co-surety gave notice to the committee for the discontinuance of the guarantee; but, upon being informed that J. S. could not be allowed to remain a member of Lloyd's without security, they, on the 17th of that month, addressed the committee as follows:—"The letter we addressed to you under date of the 11th instant, notifying

RENEWAL OF GUARANTEE—*continued.*
the putting an end to our guarantee dated 24th March, 1858, on behalf of J. S., we now hereby withdraw and declare that such guarantee shall continue in force upon the same terms and conditions as are mentioned in such guarantee." By the rules of Lloyd's one member only of a firm is allowed to act as a broker; but he may obtain a "substitute's ticket," which enables his substitute to contract for him in the house. In January, 1862 J. S. appointed H. his substitute, and H. as such substitute entered into contracts with underwriting members of Lloyd's. All the contracts made after April, 1860, whether by J. S. or his substitute, were made in the name and on account of the partnership. Many of these contracts resulted in debts due to members of Lloyd's from the partnership:—*Held*, that the guarantee was to be construed with reference to the circumstances existing in April, 1860, that it included therefore all transactions by J. S. in his capacity of broker, after April, 1860, whether by himself personally or by H. as his substitute, and whether for his own sole benefit or for the benefit of the firm, and consequently that the defendant was liable under the guarantee for these partnership debts. Leathley *v.* Spyer - - - - - - 595

RENT—Payment in advance—Mortgage - 589
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RESIGNATION—Office—59 Geo. 3, c. 12, s. 7
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RIVER—Fishing-weir—Salmon Fishery Acts
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SATISFACTION—Payment into court—Interest
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SHERIFF—Arrest—Creditors' deed—Registration
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—— Certificate of registration of creditors' deed—Escape - - - - 414
See Certificate of Registration. 2.

SHIP—Barge—County Court Admiralty jurisdiction - - - - - 428
See County Court Jurisdiction. 1.

SLANDER OF TITLE—*Evidence—Malice—Nonsuit—Practice.*] A. died possessed of furniture in a beer-shop. His widow, without taking out administration, continued in possession of the beer-shop for three or four years, and then died, having

SLANDER OF TITLE—*continued.*
whilst so in possession conveyed all the furniture by bill of sale to her landlords by way of security for a debt she had contracted with them. After the widow's death, the plaintiff took out letters of administration to the estate of A., and informed the defendant, the landlord's agent, that the bill of sale was invalid, as the widow had no title to the furniture. Subsequently the plaintiff was about to sell the furniture by auction, when the defendant interposed to forbid the sale, and said that he claimed the goods for his principals under a bill of sale. On proof of these facts, in an action for slander of title, the plaintiff was nonsuited:—*Held*, that the mere fact of the defendant's having been told before the sale that the bill of sale was invalid, was no evidence of malice to be left to the jury, and that the plaintiff was therefore properly nonsuited. Steward *v.* Young - - 122

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17 Ric. 2, c. 9 - - - - 657
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12 Edw. 4, c. 7 - - - - 657
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4 Anne c. 16 - - - - 589
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27 Geo. 3, c. 17 - - - - 235
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56 Geo. 3, c. lxv. - - - 224
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59 Geo. 3, c. 12, s. 7 - - - 201
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3 Geo. 4, c. 126, s. 41 - - - 497
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2 Wm. 4, c. 45, s. 27 - - 246, 252
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3 & 4 Wm. 4, c. 74 - - 16, 424
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1 & 2 Vict. c. 110, s. 17 - - - 391
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8 & 9 Vict. c. 18, s. 16 - - - 553
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15 & 16 Vict. c. 55 - - - 80
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—— c. 76, s. 18 - - - - 542
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—— c. 83 - - - - 523
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16 & 17 Vict. c. 115 - - - 523
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17 & 18 Vict. c. 31, s. 3 - - - 622
See Railway and Canal Traffic Act, 1854.

—— c. 102 - - - - 503
See Corrupt Practices Prevention Act, 1854.

—— c. 125, s. 50 - - - 146
See Inspection of Documents.

—— c. 125, s. 51 - - - 107
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18 & 19 Vict. c. 122 - - - 564
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19 & 20 Vict. c. 108, s. 43 - - 129
See Withdrawal of Juror.

21 & 22 Vict. c. xcii - - - 19
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24 & 25 Vict. c. 109 - - - 657
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—— c. 134 - - - - 4
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—— —— ss. 192, 198 - - - 414
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30 & 31 Vict. c. 102, s. 3 - 239, 262
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—— c. 142, s. 2 - - - - 435
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—— —— s. 10 - - - - 129
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31 & 32 Vict. c. 71, s. 3 - - - 428
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—— c. 125 - - - 172, 185, 407
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32 & 33 Vict. c. 27, s. 15 - - 485
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—— c. 51, s. 4—County courts - 428
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SUING AND LABOURING CLAUSE—*Marine Insurance—Policy on Freight—Expense incurred to avert a Loss of Freight.*] A ship with a cargo of palm-oil for Liverpool was stranded near Pwllheli on the coast of Wales. It became necessary to land the cargo there, and this was properly done. The ship after some temporary repair on the beach, was towed to Carnarvon, the nearest port, and repaired so as to be thoroughly sea-worthy for the completion of the voyage. The oil was forwarded by railway to Liverpool, at a cost to the ship-owner of 212*l.* 15*s.* 1*d.*; and the freight was received by him. The oil might have been kept at Pwllheli until the ship was repaired and then re-shipped at T., a place about seven miles from Pwllheli. This would have been a reasonable

SUING AND LABOURING CLAUSES—*continued.*

course to adopt, and would have cost the ship-owner 70*l.* In an action against the insurers on freight:—*Held*, that the ship-owner, having incurred expense for the purpose of averting a loss of freight, was entitled to recover, under the suing and labouring clause, so much thereof as was reasonably incurred; and that the proper measure was the sum it would have cost to re-ship the oil at T. Lee *v.* The Southern Insurance Company - - - - - - 397

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——Rate collector - - - - 201
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SURETY FOR RATE COLLECTOR—*Acceptance by Principal of a new Office—Assistant-Overseer—Collector of Rates—Resignation under* 59 *Geo.* 3, *c.* 12, *s.* 7—*Appointment under* 7 *&* 8 *Vict. c.* 101, *s.* 62.] By 59 Geo. 3, c. 12, s. 7, the vestry of a parish are empowered to elect assistant-overseers, and two justices may by warrant appoint the persons so elected to be assistant-overseers for the purposes and with the salary fixed by the vestry; and every person so appointed shall continue to be assistant-overseer until he shall resign, or his appointment be revoked by the vestry.—By 7 & 8 Vict. c. 101, s. 62, on application by the board of guardians of any parish or union, the Poor Law Commissioners may direct the guardians to appoint a paid collector of poor-rates for such parish or union, and all powers of the vestry, or of justices, or of any persons other than the board of guardians to appoint a collector, and all appointments under such powers, shall cease.—In April, 1865, A. was, under 59 Geo. 3, c. 12, s. 7, elected by the vestry of the parish of West Malling, and duly appointed by two justices, assistant-overseer of the parish, at a salary of 20*l.* a year. The warrant of appointment defined his duties, amongst which were the collection of poor-rates and the keeping of accounts.—In June, 1865, the defendant became surety for A. in a bond to the guardians of the union which comprise West Malling, the condition of which bond was that A. should faithfully perform all the duties of his office, and in all matters relating thereto obey the overseers, subject to the orders of the poor-law board, and keep books, and pay over moneys to such persons as the overseers should direct.—In April, 1866, the board of guardians of the Malling Union, on the recommendation of the vestry of West Malling, appointed A. collector of the poor-rates for West Malling at a poundage of 6*d.* The poor-law board duly approved the appointment, and made an order fixing the remuneration of the collector at 6*d.* in the pound, as proposed. The duties under the two appointments were substantially the same. After the last appointment A. continued to perform the same duties as he had before performed, and the appointment of April, 1865, was not otherwise resigned or revoked.—A. having made default, after the last appointment,

SURETY FOR RATE COLLECTOR—*continued.*
in keeping books and in paying over money, the defendant was sued on the bond:—*Held*, that the two appointments were inconsistent and incompatible; that the appointment of April, 1865, ceased, by virtue of 7 & 8 Vict. c. 101, s. 62, on A.'s acceptance of the appointment by the guardians in 1866; and consequently that the liability of the defendant as surety on the bond was at an end.—*Semble*, that there was, under the circumstances, both a revocation of the first appointment by the vestry, and a resignation by A. The Malling Union *v.* Graham - - - 201

SURETYSHIP: *See* Surety.

TAXATION OF COSTS—*Number of Counsel on a Reference—Arbitrator's Fees—Master's Discretion—Practice.*] It is the usual practice on the taxation of the costs of a reference to allow one counsel only on each side; but this is not an inflexible rule, and each case must depend upon its own particular circumstances.—The master, on the taxation of the costs of a reference which involved a large sum of money and a long and complicated inquiry, allowed the fees of one only of two counsel retained by the plaintiff,—assuming that there was an inflexible rule that only one counsel should be allowed:—*Held*, that the master should review his taxation in order that he might have an opportunity of exercising his discretion in the matter.—*Hawkins* v. *Rigby* (8 C. B. (N. S.) 271; 29 L. J. (C.P.) 228) explained. Where a Queen's Counsel acts as arbitrator, the ordinary scale of fees applies as in other cases. But it is competent to the master, in his discretion, to increase the usual allowance where he thinks the usual allowance is insufficient. Sinclair *v.* The Great Eastern Railway Company [135

2. —— *Sending Commissioner from this Country to examine Witnesses Abroad—Master's Discretion—Practice.*] On the taxation of costs in an action on a policy of insurance, where the questions involved were of an extremely complicated and important character, the master, having duly considered all the circumstances, allowed the expenses of sending a barrister as commissioner to examine witnesses in the Canaries.—The Court refused to interfere with his discretion. Yglesias *v.* The Royal Exchange Assurance Corporation - - - - - - - 141

3. —— *Discretion of Master—Subsistence Money for Witnesses detained to give Evidence.*] In an action upon a policy of insurance, the master, on taxation of the plaintiffs' costs, allowed subsistence-money for the captain (whose conduct was impugned by the defendant, and whose personal attendance at the trial was therefore admitted to be necessary) from the issuing of the writ until the trial, a period of eighteen months, at the rate of 10*s.* a day; the trial having been delayed by the necessity for each party sending out a commission to examine witnesses at the place where the disaster occurred:—*Held*, that, in the absence of anything to shew that the master had exercised an improper discretion either as to the amount of the period of the allowance, the Court could not interfere. Potter *v.* Rankin - 518

TAXATION OF COSTS—*continued.*
—— Parliamentary Elections Act, 1868 [172, 185, 407
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—— Regula Generalis, 1870, respecting allowance of more than one counsel on writ of inquiry.
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—— Writ of inquiry—"Good jury." - 165
See "Good Jury."

TELEGRAM—Contract—Statute of Frauds 295
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See Vote for Parliament. 6.
—— Vote for parliament—Occupation—Corporation - - - - - 262
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TERMINATION OF TENANCY—*Landlord and Tenant—Licence—Revocation.*] There is no objection in law to a tenancy determinable by a week's notice to quit, and a reasonable time being allowed after the expiration of the notice for the tenant to remove his goods.—A. let a house to B. as weekly tenant on the terms that A. would allow B. a reasonable time to remove his goods after the termination of a notice to quit. A. died, and his son C. succeeded to the property and received rent from B. C. gave B. a week's notice to quit, and, at the end of the week, took possession of the premises and refused to allow B. a reasonable time to remove his goods:—*Held*, that a jury were justified in finding that C. was bound by the stipulation respecting the tenancy entered into by his father, and that B.'s tenancy continued for a reasonable time after the notice so far as was necessary for the purpose of removing the goods.—A. allowed B. to stack timber upon a wharf adjoining the premises let to him by A., and the rent was paid partly in respect of this privilege:—*Held*, that such licence might also be considered as continued by C., and that it could not be revoked without allowing B. reasonable time to remove the timber. Cornish *v.* Stubbs - 334

TEST-BALLOT—Bribery - - - 503
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See Railway and Canal Traffic Act, 1854.

TRAVELLER—*Public House—Innkeeper opening his House on Sunday—Burthen of Proof*—11 & 12 *Vict. c.* 49, *s.* 1—*Wine and Beer House Act*, 1869 (32 & 33 *Vict. c.* 27), *s.* 15.] Upon an information against an innkeeper, under 11 & 12 Vict. c. 49, s. 1, for opening his house for the sale of beer during the prohibited hours on Sunday, the

TRAVELLER—*continued.*
burthen of proof that the innkeeper knew that the persons supplied with beer were not travellers, lies upon the informer; and this question is not affected by the Wine and Beer House Act, 1869.—*Davis* v. *Scrace* (Law Rep. 4 C. P. 172) followed. Morgan v. Hedger - - - 485

2. —— *Innkeeper opening House on Sunday—Burthen of Proof*—11 & 12 *Vict. c.* 49, *s.* 1—*Costs of Appeal.*] Upon an information against an innkeeper, under 11 & 12 Vict. c. 49, s. 1, for opening his house for the sale of wine and beer during the prohibited hours on Sunday, the burthen of proof that the innkeeper knew that the persons supplied with beer or wine were not travellers, lies upon the informer.—Eight persons went to a refreshment-room at a railway station (which room was attached to and formed part of the defendant's hotel) on Sunday morning at 11.10, six of whom had a glass of beer and the other two a glass of sherry each, standing at the counter. Four of the men were residents in the town within half a mile of the station; the other four were strangers. A train was due at 11.13. The strangers and three of the residents went by the train, and the fourth (who had been to see his son off) returned home. Two of the three residents who went by the train were seen walking in the town between two and three in the afternoon of the same day. There was a printed notice hung up in a conspicuous part of the refreshment-room intimating that refreshments were supplied during the time of Divine service on Sundays only to travellers, and that those who improperly obtained them would subject themselves to penalties; and it was proved that the defendant had given directions to his servants to inquire, before supplying any refreshment, whether or not the person asking for it was a traveller.—The magistrates found that the four residents were not "travellers," but did not in terms find that the defendant knew it; and they convicted him in a penalty:—The Court quashed the conviction, on the ground that the onus of proving knowledge in the defendant rested on the informer; and intimated that, inasmuch as this rule had been so repeatedly laid down by the Court, they would in future, when a conviction was quashed for want of such proof, consider it right to impose costs. Copley *v.* Burton - - - - - - 489

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VOTE FOR PARLIAMENT—*County Vote—Qualification—Freehold Benefice.*] A. claimed a vote for a county in respect of the incumbency of a district church. As incumbent he had the freehold of the church and was entitled to annual stipends of 150*l.* and 50*l.* from the Ecclesiastical Commissioners and Governors of Queen Anne's Bounty, respectively, paid out of funds which

VOTE FOR PARLIAMENT—*continued.*
did not arise from land within the parish in which he claimed to be registered; to fees on the burial in a cemetery, also out of the parish, of persons dying within the district attached to the church; and to fees for marriages, baptisms, and churchings, performed within the church; each of which amounted to more than 40*s.* a year:—*Held*, that he was not entitled to a vote. Kirton *v.* Dear - - - - - 217

2. —— *County Vote—Perpetual Curate—Equitable Freehold.*] Lands of the value of 40*s.* per annum were duly conveyed in 1856 "to the use of C. and his successors, vicars of the vicarage of Holy Trinity, Cambridge, for the time being, for ever." The incumbency was only a perpetual curacy; and the respondent became, in 1866, incumbent as perpetual curate, and claimed to be entitled to vote for the county in respect of the land so conveyed:—*Held*, that he was entitled to vote for the county, as he had at least an equitable freehold in the land. Wallis *v.* Birks [222

3. —— *County Vote—Pew in a Church—Easement*—56 *Geo.* 3, *c. lxv.*—2 & 3 *Vict. c.* 33—*(Private)—Practice—Overseers named Respondents—Notice of Appeal*—6 *Vict. c.* 18, *ss.* 43, 64.] Under the provisions of a private Act (56 Geo. 3, c. lxv.) a church was built by certain subscribers and proprietors, in whom the freehold was vested. By the Act certain trustees were impowered "to let or sell and transfer and convey, for the purpose only of attending Divine service," certain of the pews and seats to the inhabitants of certain parishes, subject to the payment of rents and assessments, and with a power of entry for non-payment.—By a subsequent private Act (2 & 3 Vict. c. 33), reciting that doubts had arisen as to the estate and interest which the subscribers and proprietors of the church took in the pews, it was enacted that the fee-simple and inheritance of and in the said pews should be vested in the said subscribers or the proprietors for the time being of the pews, their heirs and assigns for ever:—*Held*, that the proprietor of a pew did not under either of these Acts acquire such a freehold interest in any portion of the soil of the church as to entitle him to a vote for the county; but merely an easement, or a qualified right to the occupation and enjoyment of the pew for the purpose of attending the services of the church.—Four persons, named, and described as "overseers of the parish," were made respondents in an appeal, and notice of prosecuting the appeal was duly served upon them all; but it turned out that only one of them was in fact overseer, upon which notice was served on the other overseers also. No respondent appearing:—*Held*, that the appellant had done all that was necessary, under 6 Vict. c. 18, s. 64, to entitle him to be heard. Brumfitt *v.* Roberts - - - 224

4. —— *County Vote—Pew in a Church or Chapel*—27 *Geo.* 3, *c.* 17.] By an Act of 27 Geo. 3, c. 17, certain trustees were impowered to take down and rebuild a chapel, and to appropriate the pews to persons who had subscribed to the building, and such persons were to be deemed proprietors, and the pews or seats were vested in

VOTE FOR PARLIAMENT—*continued.*

them and their heirs for ever. It did not appear in whom was the freehold of the land upon which the chapel was built:—*Held*, that the proprietors of pews had not such a freehold interest in any portion of the soil of the chapel, or in any profit arising thereout, as to entitle them to votes for the county. GREENWAY *v.* HOCKIN - 235

5. —— *Borough Vote—Joint Occupation of Dwelling House*—30 & 31 *Vict. c.* 102, *s.* 3—*Lodger.*] A person, otherwise qualified as an inhabitant occupier, as owner or tenant, of a dwelling house in a borough, under 30 & 31 Vict. c. 102, s. 3, does not become a joint occupier within the proviso, and so lose his qualification, by letting to a lodger the exclusive use of a bedroom and the joint use of a sitting-room. BREWER *v.* M'GOWEN - - - - - 239

6. —— *Borough Vote—Occupation as Tenant under* 2 *Wm.* 4, *c.* 45, *s.* 27—*Chambers in the Inns of Court—Sub-letting of Part.*] The tenant of a set of chambers in the Temple, let to each of two sub-tenants a room unfurnished, of which the sub-tenant had the exclusive use, with the joint use of the vestibule, and a key of the outer door, the tenant himself retaining one room for his own exclusive use, and providing attendance, light, and firing for the whole set:—*Held*, that the sub-letting did not deprive the tenant of his right to be registered as occupier of a house as tenant under 2 Wm. 4, c. 45, s. 27. SMITH *v.* LANCASTER - - - - - 246

7. —— *Borough Vote—"Counting-house" within s.* 27 *of* 2 *Wm.* 4, *c.* 45—*Part of a House.*] To entitle the occupier to a borough vote in respect of a "counting-house," under s. 27 of 2 Wm. 4, c. 45, it need not consist of an entire building, or be structurally severed from the rest of the house of which it forms a part. PIERCY *v.* MACLEAN [252

8. —— *Borough Vote—Occupation as Owner or Tenant under* 30 & 31 *Vict. c.* 102, *s.* 3—*Member of a Corporation Aggregate—Naval Knights of Windsor.*] The Naval Knights of Windsor were incorporated by Royal charter. According to the rules of the foundation, which was of a collegiate character, the members dined together in a common hall, each knight was on his election placed in the occupation of a dwelling house forming part of the collegiate buildings which were conveyed to the corporation; he held the house, by virtue of his appointment, which was for life, subject to expulsion in the event of his marrying or being guilty of certain offences or breaches of discipline; and had to keep the house in repair:—*Held*, that the occupation of each knight was as a member of the corporation merely, and subject to regulations which were inconsistent with ownership in the individual, and therefore did not confer a right to a borough vote, as an inhabitant occupier, as owner, or tenant. DURANT *v.* KENNETT - - - - - 262

9. —— *Borough Vote—Qualification—Corporation Aggregate—Canon—Occupation of Residentiary House.*] The Dean and Chapter of Exeter are a corporation aggregate; there are five canons in the chapter, who are appointed for life, and five

VOTE FOR PARLIAMENT—*continued.*

houses which the canons are entitled to occupy, and with their enjoyment of which the chapter cannot interfere. At the election of a canon he produces the key of the house occupied by his predecessor, and prays to be admitted. As one of the canons he is elected and decreed to be installed, and thereupon takes possession of his house. Each canon repairs his house at his own expense:—*Held*, that the proper inference was that each canon holds his house as a corporation sole and not as a member of the chapter; and that he is therefore entitled to a vote for the city in respect of it. FORD *v.* HARINGTON - - - 282

—— 10. *Borough Vote—Notice of Objection—Several Lists—Description of List*—6 *Vict. c.* 18, *s.* 17, *Sch. B. No.* 11.] The borough of Warrington consists of three townships, one being Warrington, each having a separate overseer, and a separate list of voters, the register being composed of the three lists. A notice of objection was signed "S. D. on the list of voters for Golborne Street in the borough of Warrington." The revising barrister found that there was only one Golborne Street in the borough, and that it was wholly in the township of Warrington; and that the description of the abode given would be commonly understood in the borough as designating the list for the township of Warrington:—*Held*, that the notice was sufficient. ALLEN *v.* GEDDES - 291

WAIVER — Security — Notice of appeal from County Court - - - 634
See COUNTY COURT APPEAL.

WEIR—Salmon Fishery Acts - - 657
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WINE AND BEER HOUSE ACT, 1869.
See STATUTES—32 & 33 VICT. c. 27.

WITHDRAWAL OF JUROR—*Subsequent Breach of Agreement under which Juror withdrawn—County Court—Cause sent from Superior Court under* 30 & 31 *Vict.* 142, *s.* 10—*Practice*—19 & 20 *Vict. c.* 108, *s.* 43.] An action of trespass to land was sent for trial to a county court under 30 & 31 Vict. c. 142, s. 10. The cause came on for trial before a jury, but before the trial was completed the parties agreed that a juror should be withdrawn and that the judge should say what should be done between them. At the next meeting of the Court, the judge was ready to pronounce his opinion, but the defendant, without assigning any reason, withdrew his consent, and the judge consequently did not give any decision:—*Held* (Brett, J., dissenting), that the withdrawal of a juror had not, under the circumstances, put an end to the action, because the defendant had not performed his part of the arrangement under which the plaintiff consented to such withdrawal: and the Court made absolute a rule calling upon

the judge of the county court to appoint a day for a rehearing. Norburn *v.* Hilliam - - 129
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—— "Counting-house" - - - 252
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—— "Nephew" - - **380, Ex. Ch. 727**
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WRIT OF INQUIRY—"Good jury"—Taxation of costs - - - - 165
See "Good Jury."

*** For Regulæ Generales under the Debtor's Act, 1869, and Regula Generalis as to the allowance for more than one Counsel on the taxation of costs on Writs of Inquiry, see Law Rep. 5 Q. B. 669.

END OF VOL. V.

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